

Exhibit V

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14	VIDEO-RECORDED DEPOSITION OF JOEL R. ELMER	14	
15	TAKEN ON BEHALF OF THE PLAINTIFFS	15	(The original exhibits were retained by the court
16	OCTOBER 4, 2017	16	reporter to be attached to the original and copies
17		17	of the transcript.)
18		18	
19		19	
20	(Starting time of the deposition: 1:10 p.m.)	20	
21		21	
22		22	
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1	I N D E X	1	UNITED STATES DISTRICT COURT
2	QUESTIONS BY: PAGE	2	FOR THE WESTERN DISTRICT OF MISSOURI
3	MR. SHAHABIAN 8	3	CENTRAL DIVISION
4	MR. RAMSEY 115	4	SHONDEL CHURCH, et al.,)
5	MS. SHIPMA 127	5)
6	MR. SHAHABIAN 129	6	Plaintiffs,)
7		7)
8	E X H I B I T S	8	vs.) Case No.
9	EXHIBIT PAGE	9) 17-04057-CV-C-NKL
10	Exhibit 1 Previously marked exhibit 12	10	STATE OF MISSOURI, et al.,)
11	Exhibit 6 Panel attorney circuit court 31	11)
12	criminal disposition form	12	Defendants.)
13	Exhibit 7 Panel attorney memorandum of 32	13	
14	understanding	14	VIDEO-RECORDED DEPOSITION OF JOEL R. ELMER,
15	Exhibit 8 Protocols 40	15	produced, sworn and examined on October 4, 2017,
16	Exhibit 9 All staff survey response 47	16	between the hours of one o'clock in the afternoon
17	summary	17	and five o'clock in the afternoon of that day, at
18	Exhibit 4 Previously marked exhibit 48	18	ACLU of Missouri Foundation, Suite 1130, 906 Olive
19	Exhibit 10 List of public defenders 55	19	Street, St. Louis, Missouri 63101, before William L.
20	spreadsheet	20	DeVries, a Certified Court Reporter (MO), Registered
21	Exhibit 11 List of public defenders 58	21	Diplomate Reporter, and Certified Realtime Reporter,
22	spreadsheet	22	in a certain cause now pending in the United States
23	Exhibit 12 11-16-15 Blau e-mail 61	23	District Court, Western District of Missouri,
24	Exhibit 13 District 12 Trial Observation 66	24	Central Division, between SHONDEL CHURCH, et al.,
25	Form	25	Plaintiffs, vs. STATE OF MISSOURI, et al.,
			Defendants; on behalf of the Plaintiffs.

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<p>1 A P P E A R A N C E S</p> <p>2</p> <p>3 For the Plaintiffs:</p> <p>4 Mr. Matthew R. Shahabian</p> <p>5 Orrick</p> <p>6 51 West 52nd Street</p> <p>7 New York, New York 10019</p> <p>8 (212) 506-3750</p> <p>9 mshahabian@orrick.com</p> <p>10</p> <p>11 Mr. James J. Maune</p> <p>12 Orrick</p> <p>13 2050 Main Street, Suite 1100</p> <p>14 Irvine, California 92614</p> <p>15 (949) 491-5616</p> <p>16 jmaune@orrick.com</p> <p>17</p> <p>18 Mr. Jason D. Williamson</p> <p>19 American Civil Liberties Union</p> <p>20 Foundation</p> <p>21 125 Broad Street, 18th Floor</p> <p>22 New York, New York 10004-2400</p> <p>23 (212) 284-7340</p> <p>24 jwilliamson@aclu.org</p> <p>25</p> <p> For the Public Defender Defendants:</p> <p> Ms. Jacqueline Shipma</p> <p> Missouri State Public Defender</p> <p> Woodrail Center</p> <p> 1000 West Nifong</p> <p> Building 7, Suite 100</p> <p> Columbia, Missouri 65203</p> <p> (573) 525-5212</p> <p> jacqueline.shipma@mspd.mo.gov</p>	<p>1 IT IS HEREBY STIPULATED AND AGREED by</p> <p>2 and between counsel for the Plaintiffs and counsel</p> <p>3 for the Defendants that this deposition may be taken</p> <p>4 in shorthand by William L. DeVries, RDR/CRR, a</p> <p>5 Certified Court Reporter and Certified Shorthand</p> <p>6 Reporter, and afterwards transcribed into</p> <p>7 typewriting; and the signature of the witness is</p> <p>8 expressly reserved.</p> <p>9 * * * * *</p> <p>10 JOEL R. ELMER,</p> <p>11 of lawful age, produced, sworn and examined on</p> <p>12 behalf of the Plaintiffs, deposes and says:</p> <p>13 (Starting time of the deposition: 1:10 p.m.)</p> <p>14 VIDEOGRAPHER: We're on the record.</p> <p>15 Today's date is October 4th, 2017, and the time is</p> <p>16 approximately 1:10 p.m. This is the video-recorded</p> <p>17 deposition of Joel R. Elmer in the matter of Shondel</p> <p>18 Church, et al., versus State of Missouri, et al.,</p> <p>19 Case Number 17-04057-CV-C-NKL, in the United States</p> <p>20 District Court for the Western District of Missouri,</p> <p>21 Central Division.</p> <p>22 This deposition is being held at ACLU</p> <p>23 of Missouri Foundation in St. Louis, Missouri. The</p> <p>24 reporter's name is Bill DeVries. My name is John</p> <p>25 Niehaus. I'm the legal videographer. We are with</p>
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<p>1 For the State of Missouri and</p> <p>2 Governor Greitens:</p> <p>3 Mr. Michael Quinlan</p> <p>4 State of Missouri</p> <p>5 Attorney General's Office</p> <p>6 815 Olive Street, Suite 200</p> <p>7 St. Louis, Missouri 63101</p> <p>8 (314) 340-7861</p> <p>9 michael.quinlan@ago.mo.gov</p> <p>10</p> <p>11 Mr. Steven R. Ramsey</p> <p>12 State of Missouri</p> <p>13 Attorney General's Office</p> <p>14 221 West High</p> <p>15 Jefferson City, Missouri 65102</p> <p>16 (573) 751-1024</p> <p>17 steven.ramsey@ago.mo.gov</p> <p>18</p> <p>19 Also present:</p> <p>20 Mr. John Niehaus, Videographer</p> <p>21 Midwest Litigation Services</p> <p>22 711 North Eleventh Street</p> <p>23 St. Louis, Missouri 63101</p> <p>24 (314) 644-2191</p> <p>25 1-800-280-3376</p> <p> Court Reporter:</p> <p> William L. DeVries, RDR/CRR</p> <p> Missouri CCR #566</p> <p> Midwest Litigation Services</p> <p> 711 North Eleventh Street</p> <p> St. Louis, Missouri 63101</p> <p> (314) 644-2191</p> <p> 1-800-280-3376</p>	<p>1 Midwest Litigation Services.</p> <p>2 Will counsel please introduce yourself</p> <p>3 for the record?</p> <p>4 MR. SHAHABIAN: Matt Shahabian for the</p> <p>5 plaintiffs.</p> <p>6 MR. WILLIAMSON: Jason Williamson for</p> <p>7 the plaintiffs.</p> <p>8 MR. RAMSEY: Steven Ramsey for the</p> <p>9 State of Missouri and Governor Eric Greitens.</p> <p>10 MR. QUINLAN: Michael Quinlan for the</p> <p>11 State of Missouri and Governor Eric Greitens.</p> <p>12 MS. SHIPMA: Jacqueline Shipma for</p> <p>13 MSPD.</p> <p>14 VIDEOGRAPHER: Can you please swear in</p> <p>15 the witness?</p> <p>16 COURT REPORTER: Do you swear or affirm</p> <p>17 that the testimony you are about to give in this</p> <p>18 proceeding will be the truth, the whole truth, and</p> <p>19 nothing but the truth?</p> <p>20 THE WITNESS: Yes.</p> <p>21 EXAMINATION</p> <p>22 QUESTIONS BY MR. SHAHABIAN:</p> <p>23 Q. Good morning, Mr. Elmer. I know we met</p> <p>24 outside, but just introduce myself again, my name is</p> <p>25 Matt Shahabian. I'm an attorney representing the</p>

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<p style="text-align: right;">Page 9</p> <p>1 plaintiffs in this case, and I'll be asking you some 2 questions for your deposition here today. Have you 3 ever been deposed before? 4 A. I don't believe so. 5 Q. Okay. So let's just go over a few 6 ground rules. If you could listen to my question 7 and wait for me to finish before answering, that 8 would be great for both me and for our court 9 reporter here. If you do not understand my 10 questions, please ask me to clarify. 11 If you would like, we have seven hours 12 scheduled for this deposition. I do not think we're 13 going to need anywhere near seven hours, but if 14 you'd like to take any breaks as we progress, please 15 let me know. I just ask that if there's a question 16 pending, you answer the question before we take a 17 break. Do you understand those ground rules? 18 A. Yes. 19 Q. Great. Could you please tell us your 20 title? 21 A. Deputy director, Missouri State Public 22 Defender system. 23 Q. What is your role as the deputy 24 director of the Missouri State Public Defender 25 system?</p>	<p style="text-align: right;">Page 11</p> <p>1 approximately ten offices that I oversaw the 2 district defenders of those offices. 3 Q. How long were you a division director? 4 A. For about three and a half years. 5 Q. And you said that was before your 6 current structure. Is there no longer a division 7 director role at the MSPD? 8 A. Well, there's one division director. 9 That's Ellen Blau. 10 Q. Okay. And how long have you been 11 employed with the MSPD in any capacity? 12 A. First as a law student beginning in 13 1983 for a couple of years, and then beginning as an 14 assistant public defender in 1987. 15 Q. So you've been there for over 30 years? 16 A. Yes. 17 Q. Congratulations. Do you have any other 18 experience in criminal defense outside of your role 19 as MSPD employee? 20 A. No. I mean, I was -- right after law 21 school I clerked for the Missouri Supreme Court for 22 two years, and of course criminal cases came before 23 us, but obviously I wasn't practicing criminal 24 defense. 25 Q. Do you understand that you're being</p>
<p style="text-align: right;">Page 10</p> <p>1 A. I am one of two deputy directors. The 2 trial division director reports to me. Our 3 operations director reports to me. Our IT director 4 reports to me. And our case contracting manager 5 director reports to me. So I oversee those persons. 6 And I also handle any special projects assigned by 7 the director. 8 Q. Who is the trial division director? 9 A. Ellen Blau. 10 Q. Who's the operations director? 11 A. Jane Duncan. 12 Q. And who is your IT director? 13 A. John Mullin. 14 Q. And the case contracting manager? 15 A. Maggie Johnston. 16 Q. How long have you been the deputy 17 director of the Missouri State Public Defender 18 system? 19 A. Since July 1st of 2014. 20 Q. What did you do before that? 21 A. I was a division director. 22 Q. What does it mean to be a division 23 director? 24 A. At the time we had multiple division 25 directors before our current structure. I had</p>	<p style="text-align: right;">Page 12</p> <p>1 deposed today as a representative of the Missouri 2 State Public Defender system pursuant to Federal 3 Rule 30(b)(6)? 4 A. Yes. 5 Q. What is your understanding of what it 6 means to be a representative of the MSPD for 7 purposes of this deposition? 8 A. My role is to answer the questions 9 truthfully that are asked of me. 10 Q. Have you reviewed the notice of 11 deposition in this case seeking a 30(b)(6) 12 deposition of the MSPD? 13 A. I -- yeah, I reviewed it. 14 (Exhibit 1, Previously marked exhibit.) 15 Q. (By Mr. Shahabian) I'm handing you 16 what's been premarked as Plaintiffs' 1. Is that the 17 notice of deposition you reviewed? 18 A. Yes. 19 Q. And my understanding is you are 20 prepared to testify to -- if you look at attachment 21 A, you'll see a list of deposition topics, 13 of 22 them numbered? 23 A. Yes. 24 Q. My understanding is you've been 25 designated to testify on all but number 13, relating</p>

3 (Pages 9 to 12)

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<p>1 to the budget. Is that your understanding?</p> <p>2 A. Yes.</p> <p>3 Q. What did you do to prepare for your</p> <p>4 deposition today?</p> <p>5 A. I did a little bit of review and I met</p> <p>6 with Ms. Shipma.</p> <p>7 Q. Did you meet with anybody else?</p> <p>8 A. Greg Mermelstein and Jane Duncan, and I</p> <p>9 believe that was it.</p> <p>10 Q. Who is Jane Duncan?</p> <p>11 A. She's the operations director.</p> <p>12 Q. Apologies. My memory is a little slow</p> <p>13 at this age. Did you review any documents in</p> <p>14 preparation for this?</p> <p>15 A. There's also a brief discussion that</p> <p>16 Michael Barrett was involved in too.</p> <p>17 Q. Was anyone else involved in that</p> <p>18 discussion?</p> <p>19 A. Ms. Shipma, Mr. Mermelstein.</p> <p>20 Q. Did you review any documents in</p> <p>21 preparation for your testimony today?</p> <p>22 A. I looked over our last annual report,</p> <p>23 the Missouri Project Report prepared by Missouri --</p> <p>24 by RubinBrown. I looked at our last workload</p> <p>25 capacity reports. A couple of turnover reports that</p>	<p>1 on the panel?</p> <p>2 A. Since July 1st, except for rare</p> <p>3 exceptions, they all go to panel attorneys.</p> <p>4 Q. Prior to July 1st, did all conflict</p> <p>5 cases go to panel attorneys?</p> <p>6 A. No.</p> <p>7 Q. What was the system prior to July 1st?</p> <p>8 A. What we called the first-level conflict</p> <p>9 we'd go to a nearby office. In the urban areas,</p> <p>10 even what we considered a second-level conflict</p> <p>11 would go to a different nearby office. Beyond that,</p> <p>12 all the other conflicts came to case contracting to</p> <p>13 be assigned to a panel of attorneys.</p> <p>14 Q. And to clarify, when you said July 1st,</p> <p>15 you meant July 1st, 2017?</p> <p>16 A. Correct.</p> <p>17 Q. What's the difference between a</p> <p>18 first-level conflict and a second-level conflict?</p> <p>19 A. Well, if an office represents A and</p> <p>20 there is another client who has a conflict with a</p> <p>21 client A, say client B has a conflict with client A,</p> <p>22 then client B would be a first-level conflict. If</p> <p>23 there's yet another client who had a conflict with</p> <p>24 client A, we'll call him client C, then that would</p> <p>25 be a second-level conflict.</p>
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<p>1 have been prepared by Jane Duncan. And I looked at</p> <p>2 some expenditure dollar numbers in our management</p> <p>3 databases.</p> <p>4 Q. Do you know if the documents you</p> <p>5 reviewed have been produced to the plaintiffs in</p> <p>6 this case as part of discovery?</p> <p>7 A. I -- I know some of them have. I can't</p> <p>8 tell you for sure if all of those have.</p> <p>9 Q. Okay. So let's turn to some of the</p> <p>10 topics you're here to testify about. I'll try to</p> <p>11 run through these as quickly as possible. I'd like</p> <p>12 to start with the policies and procedures regarding</p> <p>13 the use of conflict counsel by the Missouri State</p> <p>14 Public Defender's office. Could you tell us</p> <p>15 generally how con -- the appointment of conflict</p> <p>16 counsel works in the Missouri State Public Defender</p> <p>17 system?</p> <p>18 A. If an assistant public defender</p> <p>19 believes they have a conflict of interest, then</p> <p>20 they -- that goes to their district defender, and</p> <p>21 ultimately if the district defender agrees then it</p> <p>22 is transferred to case contracting, and unless I</p> <p>23 have questions it's assigned to someone on our</p> <p>24 panel, a private attorney on our panel.</p> <p>25 Q. Do all conflict cases go to attorneys</p>	<p>1 Q. So a second-level conflict would be two</p> <p>2 or more conflicts or am I misunderstanding?</p> <p>3 A. That's correct. For instance -- well,</p> <p>4 that's correct.</p> <p>5 MR. QUINLAN: Like if there were</p> <p>6 multiple defendants in the same case.</p> <p>7 A. Yes. If there were three</p> <p>8 co-defendants, then there would be one for the local</p> <p>9 office, there would be a first-level conflict, and</p> <p>10 there would be a second-level conflict.</p> <p>11 Q. (By Mr. Shahabian) And then for</p> <p>12 conflicts of third level or higher, would those go</p> <p>13 to panel attorneys?</p> <p>14 A. Yes. Most of the second-level</p> <p>15 conflicts went to panel attorneys, and third-level</p> <p>16 and beyond all went to panel attorneys.</p> <p>17 Q. How is the panel attorney system</p> <p>18 administered?</p> <p>19 A. Could you clarify what you mean by</p> <p>20 administered? It's a pretty broad term.</p> <p>21 Q. Sure. It is a broad term. I'll try to</p> <p>22 be more specific. How does an attorney end up on</p> <p>23 the panel attorney list?</p> <p>24 A. They make application. They fill out a</p> <p>25 panel attorney application.</p>

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<p style="text-align: right;">Page 17</p> <p>1 Q. What does that application require them 2 to provide? 3 A. Name, address, other personal 4 identification such as bar number, years of 5 practice, recent jury trial experience, a couple of 6 references for us to check, and if they want 7 anything beyond misdemeanors and C and D felonies, 8 then they have to outline their experience in those 9 other areas, such as A and B felonies, homicides, 10 appeals, etc. 11 Q. Do all panel attorneys have criminal 12 defense experience prior to becoming panel 13 attorneys? 14 A. No. 15 Q. Do all panel attorneys have jury trial 16 experience prior to becoming panel attorneys? 17 A. No. 18 Q. Roughly what percentage would you say 19 of panel attorneys have criminal defense experience 20 prior to becoming panel attorneys? 21 A. The large majority, but I can't tell 22 you beyond that. 23 Q. Roughly what percentage would you say 24 of panel attorneys have jury trial experience prior 25 to becoming panel attorneys?</p>	<p style="text-align: right;">Page 19</p> <p>1 in our -- in our interest to do so because of our 2 desperate need for attorneys in those counties that 3 they'd be willing to go to without the entire 4 circuit. 5 So then we have our panel attorneys 6 broke up by counties that -- that they're eligible 7 for, and presumptively it is a rotating assignment 8 with a -- with a preference for what we call a home 9 county preference. By home county, we don't mean 10 where their home is, we mean where their office is. 11 So we would first go to, you know -- 12 for instance, if there's a case in Crawford County 13 and, you know, our presumptive pick would be whoever 14 is up next in line who has an office in Crawford 15 County who is eligible for the type of case that 16 we're assigning based upon what types of cases they 17 apply for and that they were approved for. There 18 are exceptions, but that's the general rule. 19 Q. Are panel attorneys free to turn down 20 assignments or is there a requirement that they 21 accept a certain number of cases? 22 A. Certainly not a requirement that they 23 accept a certain number of cases, but they are 24 expected to accept assignments. We -- we 25 occasionally make exceptions, but no, the</p>
<p style="text-align: right;">Page 18</p> <p>1 A. I can't really say. I couldn't answer 2 that question. 3 Q. How often are panel attorney 4 applications rejected by the MSPD? 5 A. Probably, you know, five to ten 6 percent. 7 Q. And are those rejections generally new 8 applicants or reapplications by existing panel 9 attorneys? 10 A. Well, they would be new applicants. 11 Existing panel attorneys don't have to reapply 12 unless they leave our panel and then apply again. 13 Q. Why would a new applicant be rejected 14 for the panel? 15 A. Either because of concerns raised by 16 reference checks. Sometimes concerns about their 17 prior performance that we're aware of. 18 Q. Once someone is on the panel, how are 19 they assigned a case? 20 A. On the -- I forgot to mention, on the 21 panel attorney application they also indicate what 22 circuits they're willing to handle cases in. Our 23 general rule is that you have to take an entire 24 circuit. You can't choose county by county. 25 We do make a few exceptions when it's</p>	<p style="text-align: right;">Page 20</p> <p>1 expectation is they take the assignment. We don't 2 ask them will you take this assignment. 3 Q. Does MSPD require conflict counsel 4 to -- for panel attorneys specifically to report the 5 nature and quantity of their caseloads outside of 6 panel attorney appointments? 7 A. No. 8 Q. Does MSPD track the workload or 9 caseload of panel attorneys based on their panel 10 attorney assignments? 11 A. To an extent, yes. 12 Q. What is that extent? 13 A. Well, we either have -- the cases 14 originally we would refer to as an open case, which 15 means it's pending. They're supposed to advise us 16 when that case has been disposed of and we close the 17 case and it's designated as closed. 18 And if we also learn some other fashion 19 that the case has been disposed of before we learn 20 from them, then we would close the case. So we have 21 open cases and we have closed cases, and so we can 22 view what someone's open caseload is. It's not 23 entirely accurate, but we do try to check against 24 Case.net every six months to keep as accurate as we 25 can.</p>

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<p style="text-align: right;">Page 21</p> <p>1 Q. Once a panel attorney has a case, if 2 they -- how would they request payment for 3 litigation expenses or expert witnesses or other 4 case-associated expenses? 5 A. They use an Excel spreadsheet that we 6 provide to them on-line and they submit that to our 7 contracts assistant, and she works with them to get 8 that and the proper information that we require, and 9 then that is submitted to me for my either -- for my 10 consideration. 11 Q. Are those requests generally approved 12 as submitted or are there rejections or 13 modifications? 14 A. They're generally approved. I mean, 15 there are modifications. There are denials, but 16 they're generally approved. 17 Q. How often do panel attorneys request to 18 use expert witnesses, investigators, or other 19 assistance on cases? 20 A. I don't have a percentage number. It's 21 not unusual. 22 Q. How are panel attorneys paid for the 23 cases they accept? 24 A. They are paid a flat fee at the 25 beginning of the case. How much the flat fee is</p>	<p style="text-align: right;">Page 23</p> <p>1 given year it's more or less than ten requests for 2 payment? 3 A. Less. 4 Q. Just taking a step back, is the panel 5 attorney program also referred to as the Code 49 6 program? 7 A. No. Code 49 is one part of the case 8 contracting program. It has to do with disposition 9 codes we use in our case management system. 10 Q. What are the -- so could you explain 11 what the Code 49 program is? 12 A. Sure. Code 49, we began using that 13 code when we first began conflicting out some 14 first-level conflicts, which was prior to July 1st, 15 2017. We -- we had enough funding that in some 16 areas we were able to contract out first-level 17 conflicts. 18 So those -- our offices, when they sent 19 those to us, would use disposition code 49 to 20 identify them as first-level conflicts. Since 21 July 1st we've continued to use code 49 for all the 22 first-level conflicts, so it's a first-level 23 conflict that's been contracted out. 24 Q. There are other codes for conflicts 25 other than first-level conflicts?</p>
<p style="text-align: right;">Page 22</p> <p>1 depends upon the case type. There is a mechanism 2 for them to request additional compensation for -- 3 for complex or extraordinary cases beyond what would 4 normally be expected in that type of case. They are 5 also paid a per diem fee for days spent in trial. 6 Q. How often do panel attorneys request 7 additional compensation for complex or extraordinary 8 cases? 9 A. Not very often. 10 Q. When those requests are made, how often 11 are they approved? 12 A. I don't have a percentage, but 13 certainly a lot of them are denied. I have granted 14 some. 15 Q. Would you say in a given year it's more 16 or less than ten? 17 A. Less. 18 MS. SHIPMA: More or less than ten that 19 are -- 20 MR. SHAHABIAN: Ten cases. 21 MR. QUINLAN: That are? 22 MS. SHIPMA: The requests that are 23 made. 24 MR. SHAHABIAN: Sorry. Let me clarify. 25 Q. (By Mr. Shahabian) Would you say in a</p>	<p style="text-align: right;">Page 24</p> <p>1 A. There are. 2 Q. So Code 49, it's fair to say, is a 3 subset of the overall panel attorney program? 4 A. Correct. 5 Q. Have conflict counsel commented to you 6 or to your knowledge anyone in the MSPD on the rates 7 that are paid for conflict counsel cases? 8 A. Yes. 9 Q. What to your knowledge have those 10 comments been? 11 A. That they're ridiculously low. 12 Q. Is that a frequent comment that's made? 13 A. Pretty frequent. 14 Q. How often are the fee payments 15 adjusted, the fee schedule adjusted? 16 A. You mean the overall fee schedule? 17 I've been doing this since July 1st of 2014. I can 18 tell you they haven't been adjusted since then. 19 Q. Generally speaking, what is the 20 experience level of a typical panel attorney? 21 A. I can't say there's a typical 22 experience level. 23 Q. Are you aware of a voluntary pro bono 24 program that has started to assist the MSPD with 25 criminal cases?</p>

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<p>1 A. Yes, if you're referring to the 2 Missouri Coalition For the Right to Counsel. 3 Q. I am. Could you describe what that 4 program is? 5 A. It is a law firm initiative where the 6 law firms -- where the law firms identify certain 7 attorneys within their firm to take assignments from 8 us for pro bono, and -- and they will work with our 9 local district defender and identify cases to send 10 to those associates and -- and we will assign them 11 to them. 12 Q. The cases are assigned to associates at 13 law firms? 14 A. Yes. It depends upon the model. 15 Ultimately that's who handles them. Some law firms 16 have us assign them to a partner who then 17 distributes them within the firm, but -- 18 Q. The expectation is associates will be 19 handling the cases? 20 A. As far as I know, yes. 21 Q. Is there an experience threshold for an 22 associate to handle these cases? 23 A. No. 24 Q. How many cases have been referred to 25 pro bono attorneys this way?</p>	<p>1 A. Occasionally. We have had training on 2 post-conviction matters that we've invited panel 3 attorneys to. We also at our last annual training 4 that's available to all of our in-house attorneys, 5 we call it spring training, but we also invited a 6 certain number of panel attorneys to that. 7 Q. Are panel attorneys required to attend 8 those trainings? 9 A. No. 10 Q. How often do panel attorneys leave the 11 panel? 12 A. Frequently. 13 Q. Do they provide reasons when they 14 decide to leave the panel? 15 A. Sometimes. 16 Q. What kinds of reasons are given for 17 leaving the panel? 18 A. Could be because of the fees are too 19 low. Could be because they're retiring from the 20 practice of law. Could be because they're going to 21 a job where they aren't allowed to take assignments 22 from us. 23 They might be unhappy with a particular 24 practice of ours, such as our requirement that they 25 take an entire circuit, and just decide that they're</p>
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<p>1 A. I think approximately 60. 2 Q. What kinds of cases have been referred 3 to pro bono attorneys? 4 A. I think all levels. Sitting right here 5 today I can't tell you whether or not we've assigned 6 a homicide case to one, but other than that I think 7 we've assigned all levels. 8 Q. Does the MSPD supervise the associates 9 in the performance of those cases? 10 A. No. 11 Q. Does the MSPD supervise the performance 12 of panel attorneys who are assigned cases? 13 A. No. 14 Q. Does the MSPD train the pro bono 15 attorneys? 16 A. MCR, pro bono attorneys, we did conduct 17 MCR training several months ago when it was kicked 18 off and we're doing some training again later this 19 week, two-day training. 20 Q. About how many hours of training would 21 a pro bono attorney have before getting a case 22 assignment? 23 A. Approximately 16 from us. 24 Q. Does the MSPD provide training to panel 25 attorneys?</p>	<p>1 not in a position to do that anymore. I mean, those 2 would be the most common that I can think of. 3 Q. Does the MSPD keep statistics on how 4 frequently -- on how much turnover there is in the 5 panel attorney system? 6 A. No. But -- no, we don't keep 7 statistics. 8 Q. Can you give a ballpark estimate? 9 A. I was going to say is they leave about 10 the same rate they come on. People come and go, but 11 the level of panel attorneys stays pretty level. 12 Q. Do panel attorneys ever withdraw from 13 cases they have been assigned to? 14 A. They do occasionally. 15 Q. What happens when they decide to move 16 to withdraw from a case? 17 A. We ask them to consult with us before 18 moving to withdraw. That may or may not happen. If 19 they haven't consulted with us and we agreed to it, 20 then we might ask them to do a resume representation 21 and that might happen, but ultimately if -- if 22 they're allowed to withdraw and they don't resume 23 representation, then we would reassign it to someone 24 else generally. 25 But you know, we also sometimes take</p>

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<p>1 the position that if it's done at a client's 2 request, that the client has chosen to -- to proceed 3 pro se or hire private counsel, then he doesn't get 4 to select what -- which public defender or which 5 special public defender, which are panel attorneys, 6 are assigned to them. I can't think of a particular 7 situation where the client has actually ended up 8 going pro se, but --</p> <p>9 Q. When you say that the cases are 10 reassigned to someone else generally, do you mean 11 another panel attorney or an MSPD public defender?</p> <p>12 A. Another panel attorney.</p> <p>13 Q. Does the MSPD ever take back cases that 14 have previously been assigned to panel attorneys?</p> <p>15 A. Rarely, but I'm sure it's happened.</p> <p>16 Q. And just to clarify, you used the term 17 special public defender. That refers to a panel 18 attorney?</p> <p>19 A. Yes.</p> <p>20 Q. What happens to the fees that are paid 21 to a panel attorney who withdraws from a case?</p> <p>22 A. Depends upon their reason for the 23 withdrawal. Sometimes it results in us believing 24 that the -- the entire fee needs to be returned to 25 us. Sometimes we feel like they may have earned a</p>	<p>1 Q. The panel attorney may be asked to 2 return the actual money paid to them, but that is 3 returned to the general revenue fund for the state 4 of Missouri?</p> <p>5 A. Yes.</p> <p>6 Q. Is that right? And that money is not 7 disbursed back to the MSPD?</p> <p>8 A. Correct.</p> <p>9 (WHEREIN, Exhibit 6, Panel attorney 10 circuit court criminal disposition form, was marked 11 for identification.)</p> <p>12 Q. (By Mr. Shahabian) So I'm showing you 13 what's been marked Plaintiffs' Exhibit 6. Do you 14 recognize this document?</p> <p>15 A. Yes.</p> <p>16 Q. What is it?</p> <p>17 A. It's our panel attorney circuit court 18 criminal disposition form.</p> <p>19 Q. Is this the form you were referring 20 earlier to when you mentioned that the MSPD attempts 21 to keep track of which cases are opened or closed?</p> <p>22 A. Yes.</p> <p>23 Q. Is this an accurate copy of this form?</p> <p>24 A. I believe so. We revise it 25 occasionally. And this one at the bottom shows this</p>
Page 30	Page 32
<p>1 portion of the fee and we'll determine which -- what 2 portion of that, and any unearned portion we'd 3 expect it to be returned to us.</p> <p>4 And when I say returned, our preference 5 is that -- that we recoup the money through reduced 6 fee assignments rather than literally have the money 7 returned to us.</p> <p>8 But if they're not able to do that for 9 either they leave the panel -- well, if they leave 10 the panel for some reason and so can't take any 11 additional assignments, then we ask them to return 12 the money, which goes to general revenue. It does 13 not go to the Missouri State Public Defender system.</p> <p>14 Q. So to break that down, if a panel 15 attorney withdraws from a case and has been paid a 16 fee, the first resort of the MSPD is to pay them a 17 reduced amount on future cases?</p> <p>18 A. Yes.</p> <p>19 Q. But if the panel attorney leaves the 20 panel before the MSPD is able to recoup through 21 reduced future payments, then the MSPD does not 22 receive money back from the panel attorney?</p> <p>23 A. Missouri State Public Defender system 24 does not return money -- does not get the money, 25 that's correct.</p>	<p>1 one was last revised on April 21st, 2016 as sitting 2 right here. I mean, I assume that's our most recent 3 one.</p> <p>4 Q. So this form is sent to panel attorneys 5 to fill out upon when a case is disposed of?</p> <p>6 A. They access it on our panel attorney 7 website.</p> <p>8 Q. Are there any other forms that MS -- 9 I'm sorry, that panel attorneys are required to 10 submit to the MSPD to inform the MSPD of the 11 progress of ongoing cases?</p> <p>12 A. There is a different form for -- I 13 believe for appeals and PCRs, post-conviction relief 14 cases.</p> <p>15 Q. For trial-level cases are there any 16 other forms that panel attorneys must submit?</p> <p>17 A. No, not for disposition of the case.</p> <p>18 (WHEREIN, Exhibit 7, Panel attorney 19 memorandum of understanding, was marked for 20 identification.)</p> <p>21 Q. (By Mr. Shahabian) So I'm showing you 22 now what's been marked Plaintiffs' Exhibit 7. Do 23 you recognize this document?</p> <p>24 A. Yes.</p> <p>25 Q. What is it?</p>

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<p>1 A. It's our panel attorney memorandum of 2 agreement.</p> <p>3 Q. Is that the same as the panel attorney 4 contract?</p> <p>5 A. Yes. Yes, that combined with a 6 notification of case assignment I would consider the 7 contract.</p> <p>8 Q. Is this an accurate copy of that 9 memorandum of agreement?</p> <p>10 A. Yes.</p> <p>11 Q. If you look at the last page of the 12 document, do you see what appears to be a fee 13 schedule?</p> <p>14 A. I do.</p> <p>15 Q. Is that an accurate statement of the 16 current fee schedule for panel attorneys?</p> <p>17 A. The fees are correct because of the 18 revision of the criminal code we now refer to what's 19 identified as C, D felony, drug, etc., where it says 20 C, D, we now refer to it as CDE.</p> <p>21 Q. But otherwise the fees are accurate?</p> <p>22 A. Yes.</p> <p>23 Q. Do panel attorneys need to renew this 24 memorandum of agreement once they've signed it?</p> <p>25 A. No.</p>	<p>1 under attorneys and staff, section five, the second 2 sentence says (quote as read):</p> <p>3 Where extraordinary expenses are 4 necessary to provide effective 5 assistance of counsel, the panel 6 attorney may submit a request for 7 extraordinary expenditure approval to 8 MSPD.</p> <p>9 Do you see that there?</p> <p>10 A. I do.</p> <p>11 Q. What would that mean? What would 12 constitute an extraordinary expense?</p> <p>13 A. I think that's referring to litigation 14 expenses.</p> <p>15 Q. What in your opinion would be an 16 example of an extraordinary litigation expense?</p> <p>17 A. Well, I think it's -- I mean it's 18 what -- it's referring to litigation expenses. I 19 wouldn't say extraordinary litigation expenses. 20 It's simply referring to litigation expenses, and 21 that could include depositions or hiring of various 22 types of experts.</p> <p>23 Q. So just to make sure I understand what 24 you're saying, generally litigation expenses are to 25 be paid for by the panel attorney. However, in</p>
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<p>1 Q. You mentioned that in addition to the 2 fee schedule panel attorneys can request 3 extraordinary compensation in special cases. What 4 would constitute an extraordinary case to deviate 5 from this fee schedule?</p> <p>6 A. Well, I can remember one for example 7 recently. I -- I approved where we had to assign an 8 attorney from a long distance, and the person was in 9 the department of corrections and he was traveling 10 those long distances both to visit the client and to 11 attend multiple hearings, something that was, you 12 know, it was very unusual because of the distance 13 from where the client was located.</p> <p>14 There's also been times when -- when 15 we've asked panel attorneys to take cases for 16 counties they're not assigned to because we had 17 nobody else to assign them to, and -- and I have 18 paid additional fee for that.</p> <p>19 Q. The contract also references 20 extraordinary expenses as opposed to payment to 21 counsel. What would constitute an extraordinary 22 litigation expense?</p> <p>23 A. Can you refer to me -- tell me where 24 you're referring to that?</p> <p>25 Q. Sure. If you look at the third page</p>	<p>1 extraordinary cases they can submit for 2 reimbursement. Is that correct?</p> <p>3 A. No. No, they're not expected to pay 4 the litigation expenses. We will pay for any 5 necessary litigation expenses. They don't have to 6 be extraordinary litigation expenses.</p> <p>7 Q. Okay. Are cases ever reassigned from 8 one panel attorney to another?</p> <p>9 A. Without going through us?</p> <p>10 Q. Correct.</p> <p>11 A. No. I mean, they will have someone 12 appear for them, but to my knowledge they -- they 13 don't hand off cases. They're not -- that would be 14 contrary to our policies and practices.</p> <p>15 Q. So let's shift topics away from 16 conflict counsel for a bit and talk about MSPD 17 public defenders and how they perform their cases. 18 Does the MSPD have written policies and procedures 19 relating to requests for expert witnesses?</p> <p>20 A. There is not a lot in terms of written. 21 There is a -- a memo I think probably from around 22 2008 or so stating what sort of information to be 23 included in requests for -- for different types of 24 litigation expenses.</p> <p>25 Q. How would an MSPD attorney request a --</p>

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<p>1 the use of an expert witness?</p> <p>2 A. They complete an encumbrance request.</p> <p>3 That's an electronic form. It first goes to their</p> <p>4 district defender for first-level approval. I mean,</p> <p>5 that's how it's submitted.</p> <p>6 Q. What limits, if any, are placed on MSPD</p> <p>7 attorneys who are requesting expert witnesses?</p> <p>8 A. There's no -- what kind of limits,</p> <p>9 dollar limits?</p> <p>10 Q. Are there monetary limits?</p> <p>11 A. No.</p> <p>12 Q. Does the availability of funds affect</p> <p>13 the ability of the MSPD to pay for expert witnesses?</p> <p>14 A. Yes, I think that's fair to say.</p> <p>15 Q. Who makes the ultimate decision on</p> <p>16 whether an expert witness will be hired?</p> <p>17 A. For noncapital cases where the request</p> <p>18 is for less than \$500, the district defender makes</p> <p>19 that decision, ultimate decision. For any capital</p> <p>20 case -- I say capital case. I really mean for any</p> <p>21 homicide case.</p> <p>22 For any homicide case or for any</p> <p>23 expense request that's for \$500 or more, that</p> <p>24 ultimately requires division director approval. Or</p> <p>25 in the instance of the divisions that</p>	<p>1 decides whether they are available to work on a</p> <p>2 specific case?</p> <p>3 A. That would be the district defender.</p> <p>4 Q. Do resource constraints affect the</p> <p>5 availability of investigators to assist on cases?</p> <p>6 MR. QUINLAN: Object to the vague form</p> <p>7 of the question.</p> <p>8 A. Certainly it can. It probably affects</p> <p>9 more on when they'll be gotten to than whether or</p> <p>10 not they're available, but I'm sure that it impacts</p> <p>11 and you end up having attorneys do some of their own</p> <p>12 investigation or in theory some investigation may</p> <p>13 not get done, but yes, yes, it would impact it.</p> <p>14 Q. (By Mr. Shahabian) To your knowledge,</p> <p>15 have district defenders requested more resources to</p> <p>16 either hire additional investigators or for</p> <p>17 investigators to be assigned to their offices?</p> <p>18 A. Yes.</p> <p>19 Q. How would an MSPD attorney request the</p> <p>20 use of a social worker?</p> <p>21 A. Through litigation expense request. We</p> <p>22 do have mitigation specialists for our capital</p> <p>23 cases, but other than that, through hiring of</p> <p>24 outside social worker.</p> <p>25 Q. So for noncapital cases, if an MSPD</p>
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<p>1 Mr. Mermelstein supervises, the deputy director, his</p> <p>2 ultimate approval since there aren't division</p> <p>3 directors in his divisions.</p> <p>4 Q. How often are requests for expert</p> <p>5 witnesses rejected?</p> <p>6 A. I can't say at the district defender</p> <p>7 level. It's pretty infrequent at the division</p> <p>8 director level. I don't know at the district</p> <p>9 defender level because they have to either give the</p> <p>10 ultimate approval on some or the first-level</p> <p>11 approval on others. Those denials don't come to us.</p> <p>12 Q. Is that process any different for other</p> <p>13 expert witnesses or -- I'm sorry, strike that.</p> <p>14 How would an MSPD attorney request the</p> <p>15 use of an investigator for their case?</p> <p>16 A. Well, we have in-house investigators in</p> <p>17 every office, so how a particular investigator is</p> <p>18 assigned to a case would be up to the practice of</p> <p>19 the local district defender. In theory they could</p> <p>20 request funds for outside investigators the process</p> <p>21 I just described for litigation expenses.</p> <p>22 Q. To your knowledge, do MSPD attorneys</p> <p>23 request funds for an outside investigator?</p> <p>24 A. Not to my knowledge.</p> <p>25 Q. For the in-house investigators, who</p>	<p>1 attorney requests the use of a social worker, it's</p> <p>2 an outside litigation expenditure?</p> <p>3 A. Yes. They may occasionally if one of</p> <p>4 our mitigation specialists had time in the capital</p> <p>5 division, there might -- we might ask them to work</p> <p>6 on it, on noncapital requests, but that's rare.</p> <p>7 MR. QUINLAN: Did you say mitigation</p> <p>8 specialist?</p> <p>9 A. Yes.</p> <p>10 Q. (By Mr. Shahabian) How would an MSPD</p> <p>11 attorney request the use of an interpreter?</p> <p>12 A. Through the encumbrance request process</p> <p>13 I've described.</p> <p>14 Q. Does the MSPD have interpreters on</p> <p>15 staff?</p> <p>16 A. No.</p> <p>17 (WHEREIN, Exhibit 8, Protocols, was</p> <p>18 marked for identification.)</p> <p>19 Q. (By Mr. Shahabian) I'm handing you</p> <p>20 what's been marked Plaintiffs' Exhibit 8. Do you</p> <p>21 recognize this document? To be clear, it's</p> <p>22 double-sided.</p> <p>23 A. No, specifically I don't.</p> <p>24 Q. Can you tell from reviewing the</p> <p>25 document what it appears to be?</p>

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<p>1 A. Well, it states its protocols for</p> <p>2 various things, such as indictments, investigative</p> <p>3 requests --</p> <p>4 (Court reporter interruption.)</p> <p>5 A. Indictments, investigation requests,</p> <p>6 expense requests.</p> <p>7 Q. (By Mr. Shahabian) Does this appear to</p> <p>8 you to be a document produced by someone in the</p> <p>9 MSPD?</p> <p>10 A. Yes.</p> <p>11 Q. You see the second page of the document</p> <p>12 is investigation requests?</p> <p>13 A. Yes.</p> <p>14 Q. If you want to take a minute and -- and</p> <p>15 review that page before I ask you any questions</p> <p>16 about it. So the top of this page under the heading</p> <p>17 it says (quote as read):</p> <p>18 Effective immediately, please follow</p> <p>19 the below referenced new procedure</p> <p>20 whenever making investigation requests</p> <p>21 in your cases.</p> <p>22 Do you see that?</p> <p>23 A. Yes.</p> <p>24 Q. And then the document outlines a set of</p> <p>25 steps to follow that involves documentation of</p>	<p>1 Q. Particular offices can set varying</p> <p>2 procedures on how to request investigators?</p> <p>3 A. Yeah, and it may not be -- yes.</p> <p>4 Q. If you look at page three of the</p> <p>5 document, the heading is expense request. Do you</p> <p>6 see that?</p> <p>7 A. Yes.</p> <p>8 Q. And then the document sets out how</p> <p>9 electronic encumbrances works. Do you see that?</p> <p>10 A. On page three, yes.</p> <p>11 Q. On page three.</p> <p>12 A. Uh-huh.</p> <p>13 Q. Does that appear to you to be</p> <p>14 referencing the encumbrance expenditure process you</p> <p>15 referenced earlier for requesting things like expert</p> <p>16 witnesses or social workers?</p> <p>17 A. If I could have one minute to read it.</p> <p>18 Yes.</p> <p>19 Q. Does this appear to be an accurate</p> <p>20 statement of MSPD's policies or practices for making</p> <p>21 an encumbrance request?</p> <p>22 A. Yes. I mean, there is the additional</p> <p>23 memo I referenced earlier that states certain</p> <p>24 information that should be included, but --</p> <p>25 Q. So certain districts may require</p>
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<p>1 investigation requests. Do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. Does this appear to be an accurate</p> <p>4 statement of MSPD procedures for requesting an</p> <p>5 investigator?</p> <p>6 A. From paragraph four under section two,</p> <p>7 this states address the e-mail to LaDonna and cc</p> <p>8 myself. I can only assume this is a document</p> <p>9 prepared by a particular office, though I'm not sure</p> <p>10 who LaDonna is, but -- I think that's why I wasn't</p> <p>11 familiar with it, but -- and also just scanning</p> <p>12 it -- well, that's the one name I see.</p> <p>13 Q. If you look at the first page, the</p> <p>14 names are Betty or Heather. Does that refresh your</p> <p>15 recollection on -- on what office may have prepared</p> <p>16 this?</p> <p>17 A. No.</p> <p>18 Q. Setting aside the names referenced in</p> <p>19 the document, does the general procedure of how to</p> <p>20 request an investigator appear to be accurate</p> <p>21 reflection of MSPD practices for requesting an</p> <p>22 investigator?</p> <p>23 A. No. I would say it would -- varies</p> <p>24 widely from office to office. This may be the</p> <p>25 procedure. It may not be for a particular office.</p>	<p>1 additional information above and beyond what the</p> <p>2 MSPD generally requires; is that fair to say?</p> <p>3 A. That might happen.</p> <p>4 Q. But generally this appears to be a</p> <p>5 correct statement of the -- the policies or</p> <p>6 practices to request an encumbrance?</p> <p>7 A. Yes.</p> <p>8 Q. Taking a step back to general</p> <p>9 oversight, how does the MSPD central office oversee</p> <p>10 districts?</p> <p>11 A. I guess I need more clarification of</p> <p>12 your question.</p> <p>13 Q. Do district defenders have to check in</p> <p>14 with the central office before issuing district</p> <p>15 specific policies?</p> <p>16 A. Local policies I believe still, you</p> <p>17 know, are supposed to be approved by division</p> <p>18 directors, but not everything would we consider a</p> <p>19 local policy. There's quite a bit of autonomy given</p> <p>20 to our district defenders.</p> <p>21 Q. Does the central office impose</p> <p>22 reporting requirements on individual districts to</p> <p>23 report statistics or case information back to the</p> <p>24 central office?</p> <p>25 A. No. Most of it's there in our</p>

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<p>1 databases that they use, so we can generate reports 2 from that. They aren't expected to send in reports. 3 Q. The database that districts use to 4 compile case information is accessible by the 5 central office as well? 6 A. Yes. 7 Q. What are some of the metrics that the 8 central office may look at to oversee district 9 offices? 10 A. I can't give you an exclusive list, but 11 depends upon what we're looking at, but if we're 12 looking at caseload, we'll look at number of cases, 13 we'll look at type of cases, we'll look at number of 14 clients, we'll look at miles covered, we'll look at 15 how many counties they're covering, we'll look at 16 number of staff they have and what types of staff. 17 We look at expenditures. 18 Q. You mentioned miles covered. What do 19 you mean by miles covered? 20 A. Work-related travel. 21 Q. What kinds of work-related travel are 22 MSPD attorneys expected to perform? 23 A. Going to court, investigating cases, 24 meeting with clients, attending training. 25 Q. Are there auditing practices that the</p>	<p>1 three and a half years or so. 2 Q. Why did the MSPD do time logging for 3 that three and a half years? 4 A. Well, both in terms of providing us 5 necessary data for the RubinBrown report and then 6 after that for legislative request. But also for 7 resource allocation within offices by district 8 defenders, resource allocation statewide by -- by 9 the director and the performance monitoring by -- by 10 supervisors to see what sort of work and how much 11 work in certain areas was being done. 12 Q. Why did the MSPD stop doing time 13 logging? 14 A. That was director Barrett's decision. 15 I think he could best answer that question, but -- 16 but I think it's fair to say that the primary reason 17 was -- was the amount of time that it was -- was 18 taking. It couldn't be justified given our 19 workload. 20 (WHEREIN, Exhibit 9, All staff survey 21 response summary, was marked for identification.) 22 Q. (By Mr. Shahabian) I'm handing you 23 what's been marked Plaintiffs' Exhibit 9, and I 24 apologize for the ridiculously small font size on 25 this document. Do you recognize this document?</p>
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<p>1 central office uses to oversee districts? 2 A. Our comptroller is considered our 3 internal auditor, Kathleen Lear. 4 Q. Does the MSPD impose timekeeping 5 requirements on MSPD attorneys? 6 A. There is a time sheet that has to be 7 completed every pay period indicating the number of 8 total hours worked each day, and then if there are 9 insufficient number of hours worked, then 10 appropriate use of either annual or sick leave. 11 Q. Is there any more detailed timekeeping 12 that MSPD attorneys are required to perform, such as 13 specific tasks performed that day? 14 A. Not currently. 15 Q. At any time were MSPD -- to your 16 knowledge MSPD attorneys required to keep such time 17 statistics? 18 A. Yes, we had time logging, which is the 19 sort of detailed timekeeping that you're referring 20 to. 21 Q. When did the MSPD do that time logging? 22 A. You know, I think it ended 23 approximately a year and a half ago. I would have 24 to look to tell you for sure, but -- and it -- I 25 think we had done it up to that point for around</p>	<p>1 A. Yeah, I believe I know what it is. 2 Q. What is it? 3 A. It's entitled All Staff Survey Response 4 Summary. I believe it was a time sufficiency survey 5 that was conducted as part of the RubinBrown report, 6 the Missouri project to come up with the appropriate 7 rates. 8 Q. Do you know approximately when this 9 document was produced? 10 A. No, I don't remember. I wouldn't want 11 to guess. 12 Q. Do you know how it was -- how this 13 survey was conducted? 14 A. I was not part of senior management at 15 that time, but I don't remember. As I remember, it 16 was sent to everyone to -- to fill out. I don't 17 remember if it was from MSPD or if it was from 18 RubinBrown that sent it. 19 Q. Do you know if the MSPD has any more 20 recent surveys similar to this one? 21 A. Not to my knowledge. 22 (Exhibit 4, Previously marked exhibit.) 23 Q. (By Mr. Shahabian) I'm showing you now 24 what's been marked Plaintiffs' Exhibit 4. Do you 25 recognize this document?</p>

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<p>1 A. It's our workload capacity report.</p> <p>2 Specifically what we call the Missouri State Public</p> <p>3 Defender cumulative caseload metrics.</p> <p>4 Q. What does this report show?</p> <p>5 A. This report is a three-month report for</p> <p>6 January through March of 2017. It shows the percent</p> <p>7 of capacity for -- for each office's caseload. By</p> <p>8 percent of capacity, I mean as compared to the</p> <p>9 RubinBrown standard.</p> <p>10 Q. So capacity refers to the RubinBrown</p> <p>11 standards for -- for workload?</p> <p>12 A. Yes.</p> <p>13 Q. Do you know who prepared this document?</p> <p>14 A. Anthony Johnson of our IT department.</p> <p>15 Q. Do you know how this document was</p> <p>16 created?</p> <p>17 A. Not the specifics of it, no. That</p> <p>18 would be an IT function, but it's -- you know, the</p> <p>19 case numbers are -- are pulled out of our case</p> <p>20 management databases. The -- the travel time</p> <p>21 currently is pulled from our -- our expense reports.</p> <p>22 In-court time is pulled from averages from when we</p> <p>23 were keeping time log data.</p> <p>24 Q. So I just want to make sure I</p> <p>25 understand this document. So I apologize for the</p>	<p>1 within I believe 30 days. That's correct.</p> <p>2 Q. And those -- and that column is</p> <p>3 subtracted from the cases initiated column to create</p> <p>4 the net new cases column; is that right?</p> <p>5 A. Yes. And actually looking closer at</p> <p>6 the top at the time of the preparation in this</p> <p>7 report, withdrawn conflict cases closed in the same</p> <p>8 month they were open. We now do it based upon</p> <p>9 30 days, but at the time it was if they were -- if</p> <p>10 we withdrew within the same month.</p> <p>11 Q. What is the next column net case units</p> <p>12 opened (RB) mean?</p> <p>13 A. That -- that is the net new cases</p> <p>14 multiplied by the RubinBrown weight given the</p> <p>15 different case types. So in other words, that 441</p> <p>16 has a lot of different case types in it. And each</p> <p>17 of those case types has a specific RubinBrown number</p> <p>18 of hours, and -- and so you know, in the background</p> <p>19 IT is through a formula multiplying each of those</p> <p>20 number of case type codes by the RubinBrown numbers</p> <p>21 that -- that are associated with that case type code</p> <p>22 and arriving at that net case units.</p> <p>23 Q. Next column is -- excuse me, the next</p> <p>24 column is attorney court time (estimated). What</p> <p>25 does that mean?</p>
Page 50	Page 52
<p>1 excruciating detail upon which we are about to</p> <p>2 embark. What does the report mean when it refers to</p> <p>3 cumulative caseload metrics?</p> <p>4 A. I didn't -- it existed before me as far</p> <p>5 as what title was given. I don't know why the word</p> <p>6 cumulative is necessarily included.</p> <p>7 Q. So let me ask it a different way. To</p> <p>8 your knowledge, do the case numbers on this document</p> <p>9 reflect only cases that were opened between March --</p> <p>10 between January 1st, 2017 and March 31st, 2017 or</p> <p>11 are these all cases on the docket of the MSPD</p> <p>12 between those dates?</p> <p>13 A. They are cases in which we commenced</p> <p>14 representation during that period of time.</p> <p>15 Q. So these are -- this spreadsheet</p> <p>16 reflects only cases where representation was</p> <p>17 commenced between January 1st, 2017 and March 31st,</p> <p>18 2017?</p> <p>19 A. Correct.</p> <p>20 Q. Is that what the fourth column cases</p> <p>21 initiated refers to?</p> <p>22 A. Yes.</p> <p>23 Q. What does minus cases withdrawn mean?</p> <p>24 A. For purposes of our percent of</p> <p>25 capacity, we do not count cases in which we withdrew</p>	<p>1 A. That is an estimation of the time that</p> <p>2 -- that attorneys spend in court where if you read</p> <p>3 the RubinBrown report, specifically footnote 14 is</p> <p>4 an uncontrollable task, and RubinBrown said that</p> <p>5 their standards do not include any time spent in</p> <p>6 court. So to accurately determine a percent</p> <p>7 capacity, you have to add that time in.</p> <p>8 Q. The next column is attorney travel time</p> <p>9 (estimated). What does that mean?</p> <p>10 A. That's an estimation of the travel time</p> <p>11 the attorneys spent, and again, according to the</p> <p>12 RubinBrown report, that time is not considered in</p> <p>13 arriving at their -- at their weight. So that --</p> <p>14 that time has to be added in.</p> <p>15 Q. Next column is workload (units plus</p> <p>16 court time plus travel). What does that column</p> <p>17 mean?</p> <p>18 A. Well, that's net case units plus</p> <p>19 attorney court time plus attorney travel time.</p> <p>20 Q. The next column is capacity. What does</p> <p>21 that mean?</p> <p>22 A. That is the number of attorneys</p> <p>23 times -- trying to make sure I get this, understand</p> <p>24 this correctly. I'm looking at the numbers. Give</p> <p>25 me one minute. Yeah, that would be the number of</p>

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<p>1 attorneys times two hundred -- 2,080 hours per year, 2 but this is a three-month report so that would have 3 to be divided by four.</p> <p>4 Q. So capacity in that column refers to 5 the capacity for the three months of this report?</p> <p>6 A. Yes.</p> <p>7 Q. What does percent of capacity refer to?</p> <p>8 A. That would be essentially the capacity 9 divided by, you know, the number of hours for those 10 three months, which would be 2,080 divided by four, 11 which is approximately 520.</p> <p>12 So I think that's, you know, 13 probably -- well, I would have to sit down and do 14 the math, but it's -- it's how much they -- you 15 know, how many -- out of the workload -- I'm sorry. 16 Give me a minute. It's the workload divided by the 17 capacity is -- is what it is.</p> <p>18 Q. And so that is the capacity utilization 19 for new cases in the three months January 1st to 20 March 31st, 2017?</p> <p>21 A. Yes.</p> <p>22 Q. Stepping back to the travel time column 23 for a minute, does travel time include the time 24 spent visiting clients?</p> <p>25 A. If they had to -- if it was travel time</p>	<p>1 A. Every three months. At the end of each 2 quarter.</p> <p>3 Q. Could you provide us with copies of 4 more recent reports than March 31st, 2017?</p> <p>5 A. We have done the one for -- for 6 April 1st through June 30th would be the last one 7 that was done, so yes, we could provide that.</p> <p>8 Q. Does the MSPD prepare reports that 9 compile not only new cases for the time period, but 10 also existing caseloads?</p> <p>11 A. I mean, in our case management database 12 it shows open cases and -- and closed cases, which 13 is the same terminology I use when describing -- or 14 conflict database, whether or not a case has been 15 disposed of or not.</p> <p>16 Q. Is a report like this prepared using 17 that data?</p> <p>18 A. No. 19 (WHEREIN, Exhibit 10, List of public 20 defenders spreadsheet, was marked for 21 identification.)</p> <p>22 Q. (By Mr. Shahabian) I'm showing you now 23 what's been marked Plaintiffs' Exhibit 10. This one 24 is a little more readable, but a lot longer. Do you 25 recognize this document? And if it would perhaps</p>
Page 54	Page 56
<p>1 that appeared on their expense reports, yes, 2 associated with that client visit.</p> <p>3 Q. What about to cover conflict cases 4 prior to July 1st of this year?</p> <p>5 A. Yes.</p> <p>6 Q. Are there other kinds of travel that 7 this may refer to?</p> <p>8 A. Yes, anything that would appear on the 9 expense reports, which is work-related travel. So 10 it could be travel time to investigate cases. It 11 could be travel time for training.</p> <p>12 Q. And you see the report breaks down each 13 area name and provides statistics for each area 14 name?</p> <p>15 A. I do.</p> <p>16 Q. And then below that there's a row that 17 says trial division total?</p> <p>18 A. Correct.</p> <p>19 Q. Do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. Is it your understanding that the area 22 names that precede that refer to cases in the trial 23 division for those area names?</p> <p>24 A. Yes.</p> <p>25 Q. How often is this report updated?</p>	<p>1 refresh -- excuse me, refresh your recollection, I 2 would encourage you to flip towards the back where 3 there's a sheet that starts with the column with the 4 row last name, first name, etc., and the first name 5 listed is Daniel Radke. I believe that may be --</p> <p>6 A. Which page are you referring to?</p> <p>7 Q. So the document unfortunately as 8 produced is not page numbered. It is the --</p> <p>9 MR. QUINLAN: It's not in alphabetical 10 order?</p> <p>11 MR. SHAHABIAN: It is -- so it was 12 produced -- this is a compilation of spreadsheets 13 that are sorted by fiscal year from fiscal years '09 14 through '17. The --</p> <p>15 MR. QUINLAN: Looks like the names on 16 this are by bar number.</p> <p>17 MR. SHAHABIAN: Correct. But for each 18 fiscal year the sheet starts over.</p> <p>19 MR. QUINLAN: I see.</p> <p>20 MR. SHAHABIAN: And the way we printed 21 from Excel, there's no way to reflect those sheet 22 names, so ...</p> <p>23 MR. QUINLAN: Okay.</p> <p>24 A. So which page are you referencing?</p> <p>25 Q. (By Mr. Shahabian) So it is -- if you</p>

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<p>1 flip back one, two, three, four, the fifth page from 2 the end of the document. 3 A. I do see that, yes. 4 Q. And the first row is last name, first 5 name, bar number, caseload, workload, and the first 6 entry is Radke, Daniel. Do you see that? 7 A. Yes. 8 Q. Does that perhaps refresh your 9 recollection as to what this document may be? 10 A. To the best of my recollection, this 11 was a report prepared as a result of a discovery 12 request in this litigation, I think. 13 Q. If you flip through starting from the 14 page with Daniel Radke to the end of this document 15 and scan the list of names, do these names mean 16 anything to you? 17 A. Well, I recognize a lot of the names. 18 I think for whatever period of time this is for it 19 is attorneys who handled cases for us during that 20 period. 21 Q. And by handle cases, are you referring 22 to employees of the MSPD or -- 23 A. Yes. 24 MR. SHAHABIAN: Just to help in terms 25 of identification purposes, I'm also going to show</p>	<p>1 Exhibit 10, those last five pages, that list of 2 names you believe refers to attorneys within the 3 trial division, employed within the trial division 4 of the MSPD? 5 A. Yes. 6 Q. So let's look at Plaintiffs' 7 Exhibit 10. What does caseload, the column caseload 8 refer to? 9 A. You know, if my memory serves me 10 correctly, that is in a case that they handled 11 during that -- by any case they handled, I mean that 12 was assigned to them at any particular time during 13 that year. 14 It may have a case that carried over 15 from a prior fiscal year but was still pending at 16 the beginning of that fiscal year, or it may mean a 17 case in which they actually commenced representation 18 during that fiscal year, but ... 19 Q. But you're not sure sitting here today 20 whether it's just new cases commenced that year or 21 total docket for that year? 22 A. I'm fairly confident it's both. 23 Q. Okay. What does workload refer to? 24 A. I think that's probably a comparison of 25 the caseload to the -- to the workload capacity of</p>
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<p>1 you what's been premarked Plaintiffs' Exhibit 11. 2 (WHEREIN, Exhibit 11, List of public 3 defenders spreadsheet, was marked for 4 identification.) 5 Q. (By Mr. Shahabian) A similar, but much 6 shorter document. If you go to the last page, which 7 is double-sided, and the first side of that page, 8 that may refresh your recollection. Similar to the 9 other document, this was produced as a series of 10 spreadsheets dated fiscal years '09 to '17. '17 is 11 at the end here. Do you recognize this list of 12 names? 13 A. Yes. Again, I think it's attorneys who 14 handled cases for us during for whichever period of 15 time. This is in-house attorneys, and I recognize 16 these names as attorneys within our appellate PCR 17 division, which makes me think that probably the 18 prior exhibit, Exhibit 10, were probably attorneys 19 within our trial division, but Exhibit 11 I think is 20 attorneys within our appellate PCR division. 21 Q. So to be clear, your understanding is 22 the names on the last two pages of Exhibit 11 refer 23 to appellate and PCR attorneys of the MSPD? 24 A. Yes. 25 Q. And turning back to Plaintiffs'</p>	<p>1 that attorney. 2 Q. How would that workload -- 3 A. By use of the RubinBrown weights. 4 Q. So workload incorporates the RubinBrown 5 metrics? 6 A. I believe so. 7 Q. Do you see going down about a quarter 8 of the way on that fifth page starting Daniel Radke 9 an entry for Nancy Pew. 10 A. I do. 11 Q. And for Nancy Pew the caseload 1.00. 12 Do you see that? 13 A. That's what it indicates, yes. 14 Q. And it says the workload is 15 1.20 percent. Do you see that? 16 A. Yes. 17 Q. Do you have an understanding of why an 18 MSPD trial attorney might have a caseload of one or 19 a workload of 1.2 percent? 20 A. I'd assume she either left right after 21 the beginning of the -- the reporting period or -- 22 or was hired right before the end of the reporting 23 period. 24 Q. So the attorneys on this list to your 25 understanding reflect attorneys employed by the MSPD</p>

15 (Pages 57 to 60)

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<p>1 at any point during the fiscal year for which this</p> <p>2 is reporting?</p> <p>3 A. Yes.</p> <p>4 (WHEREIN, Exhibit 12, 11-16-15 Blau</p> <p>5 e-mail, was marked for identification.)</p> <p>6 Q. (By Mr. Shahabian) I'm handing you</p> <p>7 what's been marked Plaintiffs' Exhibit 12. Do you</p> <p>8 recognize this document?</p> <p>9 A. In general, yes. I don't remember</p> <p>10 seeing this specific e-mail, but yes.</p> <p>11 Q. What does it appear to you to be?</p> <p>12 A. A guide for certain information for</p> <p>13 district defenders to -- to look at in appraising</p> <p>14 attorneys in line for promotion, the assistant</p> <p>15 public defender three or assistant public defender</p> <p>16 four.</p> <p>17 Q. What is a assistant public defender</p> <p>18 three?</p> <p>19 A. Well, our assistant public defender</p> <p>20 classification level, it's a -- it's a merit-based</p> <p>21 promotion system with minimum tenure requirement.</p> <p>22 So an APD III for instance means someone who has met</p> <p>23 the minimum tenure requirement of two years as an</p> <p>24 assistant public defender two and who meets the --</p> <p>25 mirror requirements for the promotion.</p>	<p>1 after that.</p> <p>2 Q. How would an assistant public defender</p> <p>3 become a managerial-level public defender such as a</p> <p>4 district defender?</p> <p>5 A. To apply for a vacancy when it occurs</p> <p>6 and be selected.</p> <p>7 Q. If there is no vacancy or they are not</p> <p>8 selected, assistant public defenders do not progress</p> <p>9 past assistant public defender four?</p> <p>10 A. Correct. We pay differentials for</p> <p>11 capital work, but that's not a promotion, just a</p> <p>12 different pay scale.</p> <p>13 Q. This document Plaintiffs' Exhibit 11 is</p> <p>14 from --</p> <p>15 A. You mean 12?</p> <p>16 Q. I'm sorry, 12. Thank you. Appears to</p> <p>17 be from Ellen Blau. Do you see that?</p> <p>18 A. I do.</p> <p>19 Q. And could you refresh my recollection</p> <p>20 as to who Ellen Blau is?</p> <p>21 A. She's our trial division director.</p> <p>22 Q. So these standards for promotion to</p> <p>23 assistant public defender three and public --</p> <p>24 assistant public defender four apply throughout the</p> <p>25 MSPD system?</p>
Page 62	Page 64
<p>1 Q. What is an assistant public defender</p> <p>2 four?</p> <p>3 A. That would be someone who has met the</p> <p>4 minimum tenure requirements, which for an assistant</p> <p>5 public defender four is two years as an assistant</p> <p>6 public defender three and meets the -- the</p> <p>7 performance requirements.</p> <p>8 Q. What is an assistant public defender</p> <p>9 two?</p> <p>10 A. That is someone who has met the minimum</p> <p>11 tenure requirement as one year as an assistant</p> <p>12 public defender one and meets the performance</p> <p>13 requirements for the position.</p> <p>14 Q. And apologies for going out of order,</p> <p>15 but what is an assistant public defender one?</p> <p>16 A. A brand-new attorney.</p> <p>17 Q. Are there --</p> <p>18 A. Brand-new assistant public defender.</p> <p>19 They may not be a brand-new attorney.</p> <p>20 Q. Are there assistant public defender</p> <p>21 classifications above four?</p> <p>22 A. Not for assistant public defenders, no.</p> <p>23 Q. What would be the next promotion after</p> <p>24 assistant public defender four?</p> <p>25 A. There would be no further promotions</p>	<p>1 A. I would not refer to these as the</p> <p>2 standards. These are the metrics that they -- that</p> <p>3 Ellen would like to see in the appraisal, things to</p> <p>4 be looked at.</p> <p>5 Q. What do you mean by metrics?</p> <p>6 A. Well, client contact, you know, the</p> <p>7 substance, how is the client contact, how frequently</p> <p>8 it's occurring. Trials, what trials have they had,</p> <p>9 what types of dispositions are they getting, what's</p> <p>10 the quality and extent of their motion practice,</p> <p>11 etc.</p> <p>12 Q. Do these metrics apply throughout the</p> <p>13 MSPD system for purposes of promotions from -- to</p> <p>14 assistant public defender three and assistant public</p> <p>15 defender four?</p> <p>16 A. This is a trial division document.</p> <p>17 Q. Do these metrics apply throughout the</p> <p>18 MSPD trial division system for purposes of promotion</p> <p>19 to assistant public defender three and four?</p> <p>20 A. This was sent in 2015. Whether or not</p> <p>21 Ellen has -- has altered it somewhat as far as her</p> <p>22 guidance of what to put in an appraisal, you would</p> <p>23 -- I -- I wouldn't want to say for sure, but it</p> <p>24 generally does.</p> <p>25 Q. For a promotion from assistant public</p>

16 (Pages 61 to 64)

<p style="text-align: right;">Page 65</p> <p>1 defender one to assistant public defender two, is 2 that promotion based solely on the attorney's tenure 3 with the MSPD? 4 A. No, there's also performance standard, 5 but it's obviously a lot lower than for a three or 6 four. 7 Q. What sort of performance standard is? 8 A. Successful performance in C and D 9 felonies. 10 Q. What would a successful performance in 11 a C and D felony look like? 12 A. An attorney that can -- you know, 13 essentially I'm just sort of summarizing, but an 14 attorney who successfully -- you know, providing the 15 necessary representation that should be provided in 16 cases up to and including C and D felonies. 17 Q. Is it often for an assistant public 18 defender one who meets the tenure requirements for 19 assistant public defender two not to be promoted to 20 assistant public defender two? 21 A. That would be rare. 22 Q. Is it fair to say that promotions to 23 assistant public defender three and assistant public 24 defender four are more merit-based than those to 25 assistant public defender two?</p>	<p style="text-align: right;">Page 67</p> <p>1 think it's been shared by the division directors for 2 district defenders to use if they wanted to. 3 Q. Is there any systemic review of the use 4 of this form to your knowledge? 5 A. I'm not sure what you mean by systemic 6 review. 7 Q. Is there -- let me rephrase. 8 Is there a practice to how this form is 9 used in District 12 or more generally? 10 A. No. 11 Q. What could it be used for? 12 A. Well, it could be used at any time 13 someone has a trial in District 12, that most likely 14 their supervisor or more senior attorney would fill 15 out when they either second-chaired the trial or 16 observed the trial. 17 (WHEREIN, Exhibit 14, District 12 Case 18 Review, was marked for identification.) 19 Q. (By Mr. Shahabian) I'm handing you now 20 what's been marked Plaintiffs' Exhibit 14. Do you 21 recognize that document? 22 A. Yes. 23 Q. What is it? 24 A. It's district defender -- District 12's 25 case review form.</p>
<p style="text-align: right;">Page 66</p> <p>1 A. I think that's fair to say. 2 (WHEREIN, Exhibit 13, District 12 Trial 3 Observation Form, was marked for identification.) 4 Q. (By Mr. Shahabian) I'm handing you 5 what's been marked Plaintiffs' Exhibit 13. Do you 6 recognize that document? 7 A. Yes. 8 Q. What is it? 9 A. It is a trial observation form. This 10 specific one is one that obviously came from our 11 Fulton trial office, District 12. 12 Q. Is it a -- is the trial observation 13 form used only in District 12 or is it used 14 throughout the MSPD system? 15 A. It's not necessarily used everywhere, 16 but it's used more than at District 12. It depends 17 upon if a district defender finds it useful and 18 decides to use it. 19 Q. Do you know who prepared this document? 20 A. I did. 21 Q. Why is this document used more at 22 District 12? 23 A. I don't know that it is used more in 24 District 12. I prepared it when I was a district 25 defender in the Kansas City trial office, and I</p>	<p style="text-align: right;">Page 68</p> <p>1 Q. What is the difference between 2 Exhibit 14, the case review form, and Exhibit 13, 3 the trial observation form? 4 A. The trial observation form would be 5 limited to cases that were tried. A case review 6 might be performed in any particular case during the 7 pendency of the case. 8 Q. What is a case review? 9 A. That's when a district defender or 10 senior attorney sits down with an attorney and it 11 reviews the case with them, including what 12 preparation has been done and needs to be done. 13 Q. Who prepared this document? 14 A. The form itself? 15 Q. Yes. 16 A. I did. 17 Q. To your knowledge, is it used outside 18 of District 12? 19 A. I used it in a Kansas City trial 20 office. Truthfully this form wasn't used nearly as 21 much as the trial observation form. I can't -- I 22 don't know which other offices are using it or how 23 frequently they're using it if they do use it. 24 Q. Is there a standardized MSPD policy to 25 conduct a case review?</p>

17 (Pages 65 to 68)

<p style="text-align: right;">Page 69</p> <p>1 A. No.</p> <p>2 (WHEREIN, Exhibit 15, District 12</p> <p>3 Guilty plea or sentencing observation form, was</p> <p>4 marked for identification.)</p> <p>5 Q. (By Mr. Shahabian) I'm handing you</p> <p>6 what's been marked Plaintiffs' Exhibit 15. Do you</p> <p>7 recognize that document?</p> <p>8 A. Yes.</p> <p>9 Q. What is it?</p> <p>10 A. District 12's guilty plea or sentencing</p> <p>11 observation form.</p> <p>12 (Court reporter interruption.)</p> <p>13 A. District 12's guilty plea or sentencing</p> <p>14 observation form.</p> <p>15 Q. (By Mr. Shahabian) Do you know who</p> <p>16 prepared this document?</p> <p>17 A. I did.</p> <p>18 Q. What would this guilty plea or</p> <p>19 sentencing observation form be used for?</p> <p>20 A. Again, it's something that would be</p> <p>21 filled out most likely by a manager or a senior</p> <p>22 attorney for a guilty plea or sentencing that --</p> <p>23 that they witnessed.</p> <p>24 Q. To your knowledge, is this document</p> <p>25 used outside of District 12?</p>	<p style="text-align: right;">Page 71</p> <p>1 Q. Does the MSPD have a policy or practice</p> <p>2 for how districts should document observing a motion</p> <p>3 hearing?</p> <p>4 A. No.</p> <p>5 Q. I want to go back to Exhibit 13 just</p> <p>6 for a minute to clean up a question I missed.</p> <p>7 That's the trial observation form. To your</p> <p>8 knowledge, is there a policy or practice of the MSPD</p> <p>9 in how districts should document observing a trial?</p> <p>10 A. No.</p> <p>11 MR. SHAHABIAN: I think it's a good</p> <p>12 time for a break.</p> <p>13 THE WITNESS: If you'd like.</p> <p>14 VIDEOGRAPHER: We're going off the</p> <p>15 record at approximately 2:34 p.m.</p> <p>16 (WHEREIN, a recess was taken.)</p> <p>17 VIDEOGRAPHER: We're back on the record</p> <p>18 at approximately 2:45 p.m.</p> <p>19 MR. SHAHABIAN: Mr. Elmer, thanks for</p> <p>20 coming back.</p> <p>21 THE WITNESS: You're welcome.</p> <p>22 Q. (By Mr. Shahabian) I want to turn a</p> <p>23 bit more to the topic of training and supervision of</p> <p>24 MSPD attorneys. Are there centralized policies</p> <p>25 within the MSPD for how new attorneys are trained?</p>
<p style="text-align: right;">Page 70</p> <p>1 A. I don't know.</p> <p>2 Q. Is there any MSPD policy that districts</p> <p>3 use to form similar to this form for purposes of</p> <p>4 guilty plea or sentencing observations?</p> <p>5 A. No.</p> <p>6 (WHEREIN, Exhibit 16, District 12</p> <p>7 Motion hearing observation form, was marked for</p> <p>8 identification.)</p> <p>9 Q. (By Mr. Shahabian) I'm handing you</p> <p>10 what's been marked Plaintiffs' Exhibit 16. Last</p> <p>11 one, I promise. Do you recognize this document?</p> <p>12 A. I do.</p> <p>13 Q. What is it?</p> <p>14 A. District 12's motion hearing</p> <p>15 observation form.</p> <p>16 Q. What would this motion hearing</p> <p>17 observation form be used for?</p> <p>18 A. Completed again most likely by a</p> <p>19 manager or a senior attorney who observed an</p> <p>20 attorney handle a motion hearing.</p> <p>21 Q. Do you know who prepared this document?</p> <p>22 A. I did.</p> <p>23 Q. To your knowledge, is it used outside</p> <p>24 of District 12?</p> <p>25 A. I don't know.</p>	<p style="text-align: right;">Page 72</p> <p>1 A. Only in the sense that there is certain</p> <p>2 training events that they're required to attend.</p> <p>3 Q. What -- what events are they required</p> <p>4 to attend?</p> <p>5 A. They attend a new employee orientation.</p> <p>6 Normally the first one that occurs after they begin</p> <p>7 employment. They have to attend new defender</p> <p>8 workshop, which is usually sometime within their</p> <p>9 first year of employment. They attend a trial</p> <p>10 skills workshop that usually occurs within their</p> <p>11 first year of employment.</p> <p>12 I think that was trial skills I had</p> <p>13 said there. And then finally we have an annual</p> <p>14 training available to all attorneys which I</p> <p>15 mentioned earlier we call spring training. They're</p> <p>16 required to attend that for their first three years</p> <p>17 and it's optional after that.</p> <p>18 Q. How long is the new defender workshop?</p> <p>19 A. Several days. Less than a week. Or no</p> <p>20 more than a week.</p> <p>21 Q. What topics does the new defender</p> <p>22 workshop cover?</p> <p>23 A. I haven't attended one for a few years,</p> <p>24 but specifically I think things like probation</p> <p>25 violations, preliminary hearings, client contact,</p>

18 (Pages 69 to 72)

<p style="text-align: right;">Page 73</p> <p>1 things like that.</p> <p>2 Q. How long is the new employee</p> <p>3 orientation? Apologies. I missed that.</p> <p>4 A. One day.</p> <p>5 Q. What is covered in the new employee</p> <p>6 orientation?</p> <p>7 A. Things like indigency determination,</p> <p>8 policies, promotions, the path of the case through</p> <p>9 the criminal justice system, and then various</p> <p>10 operations, personnel make presentations. Our</p> <p>11 general counsel and I think our HR manager covers</p> <p>12 things within their -- their areas, HR practices.</p> <p>13 Q. How long is the trial skills workshop?</p> <p>14 A. I think that's again several days. No</p> <p>15 more than a week.</p> <p>16 Q. This may be an obvious question, but</p> <p>17 what topics are covered in the trial skills</p> <p>18 workshop?</p> <p>19 A. Trial skills, from voir dire through --</p> <p>20 through closing and everything in-between.</p> <p>21 Q. How long is spring training?</p> <p>22 A. I believe that's usually two or</p> <p>23 three days.</p> <p>24 Q. What topics are covered in spring</p> <p>25 training?</p>	<p style="text-align: right;">Page 75</p> <p>1 Q. You mentioned immigration concerns.</p> <p>2 Are new attorneys required to receive training on</p> <p>3 immigration concerns in providing defense?</p> <p>4 A. No. Let me say I'm referring to</p> <p>5 statewide training. I can't tell you what the</p> <p>6 requirements of particular district defenders would</p> <p>7 be within their office.</p> <p>8 Q. Do district defenders add additional</p> <p>9 requirements on top of the statewide training?</p> <p>10 A. They may. Something within their</p> <p>11 control such as undergoing training within their own</p> <p>12 office.</p> <p>13 Q. Aside from these statewide training</p> <p>14 workshops you've mentioned, are there other forms of</p> <p>15 training that are offered on a statewide basis?</p> <p>16 A. Well, as I said, different</p> <p>17 presentations given in spring training. You know,</p> <p>18 there's probably other, you know, single focused</p> <p>19 training that are periodically put on, such as</p> <p>20 appellate training or post-conviction training or on</p> <p>21 some other subject that's more -- more periodic than</p> <p>22 annual.</p> <p>23 Q. Who is charged with training new</p> <p>24 attorneys?</p> <p>25 A. Well, statewide we have a training</p>
<p style="text-align: right;">Page 74</p> <p>1 A. That varies from year to year. It's</p> <p>2 more advanced training and then very specific.</p> <p>3 There might be something on, you know, immigration</p> <p>4 one year, there might be something on motion</p> <p>5 practice another year. There will be several topics</p> <p>6 covered. Usually multiple tracks where folks can</p> <p>7 choose which presentations to -- to attend.</p> <p>8 Q. Is there special training for juvenile</p> <p>9 defense?</p> <p>10 A. We do try to do juvenile training. It</p> <p>11 usually occurs about once a year.</p> <p>12 Q. Is that for all MSPD attorneys or for</p> <p>13 attorneys focused on juvenile cases?</p> <p>14 A. It's generally focused on attorneys</p> <p>15 handling juvenile cases. We request that offices</p> <p>16 send at least one person.</p> <p>17 Q. Is at least one person from each office</p> <p>18 required to attend a juvenile training?</p> <p>19 A. I wouldn't say required, no.</p> <p>20 Q. Is there training for handling</p> <p>21 defendants with mental health issues?</p> <p>22 A. You know, occasionally we may have --</p> <p>23 we may have held specialty training. I couldn't say</p> <p>24 for sure. Certainly that might be a presentation in</p> <p>25 spring training.</p>	<p style="text-align: right;">Page 76</p> <p>1 director, and the district defenders certainly also</p> <p>2 have that responsibility.</p> <p>3 Q. District -- what is the role of a</p> <p>4 district defender?</p> <p>5 A. They are the managing attorney for</p> <p>6 their local district office.</p> <p>7 Q. What are their responsibilities as the</p> <p>8 managing attorney for the local district office?</p> <p>9 A. Well, to train the attorneys, to assign</p> <p>10 the workload, to monitor the performance of the</p> <p>11 attorneys, to do -- make -- to do appraisals, to</p> <p>12 make promotion requests, to work with general</p> <p>13 counsel and our HR manager and division director</p> <p>14 with any performance concerns. Manage their budget.</p> <p>15 Q. Are district defenders expected to take</p> <p>16 on case assignments?</p> <p>17 A. That is a decision the district</p> <p>18 defender makes in consultation with the division</p> <p>19 director, but generally, yes, our district defenders</p> <p>20 handle caseload.</p> <p>21 (Court reporter interruption.)</p> <p>22 A. Handles caseload, personal caseload.</p> <p>23 Q. (By Mr. Shahabian) How are new MSPD</p> <p>24 attorneys recruited?</p> <p>25 A. You know, for specifics I'd want to</p>

19 (Pages 73 to 76)

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<p>1 defer to our HR manager, but in general we -- we do 2 on-campus recruiting at the law schools. Generally 3 the law schools within Missouri. 4 I know they -- I think they do some 5 posting of vacancies in publications or on the 6 Missouri Bar website. Certainly by -- by word of 7 mouth. We also have a website. I believe our 8 employment application is on it. 9 Q. Does the MSPD face any problems in 10 recruiting new attorneys? 11 A. We do. 12 Q. What kinds of problems? 13 A. Not enough. Oftentimes don't have -- 14 don't have any or any sufficiently qualified 15 attorneys to -- to fill a vacancy with. It's not 16 unusual. Frequently is a vague term, but it's not 17 unusual, especially in rural areas. 18 Q. Why is that? 19 A. Why don't we get enough? Pay. Their 20 particular interest, whether or not they want to do 21 the work. How many people want to live in that 22 area. I mean, it could be for various reasons, but 23 certainly the pay has a lot to do with it. 24 Q. Who decides when MSPD attorneys are 25 promoted?</p>	<p>1 met the minimum time and tenure requirements, but I 2 don't -- I'm not sure how to answer your question. 3 But certainly there are assistant 4 public defender twos who are not promoted to three 5 at their minimum tenure eligibility date, but we 6 certainly strive to get them to that point by then. 7 Q. Just going back to our -- our last 8 topic, you mentioned that part of the reason the 9 MSPD has trouble recruiting is pay, but I didn't ask 10 you to be specific. What do you mean by pay? 11 A. Our low salaries. 12 Q. What is the starting salary for a new 13 public defender? 14 A. I think it's approximately 39,000. 15 Q. Is there adjustments for locality? 16 A. No. 17 Q. So for any public -- new public 18 defender placed in any office in the state of 19 Missouri, the starting salary is approximately 20 39,000? 21 A. Yes. I mean, they're in the process 22 for -- for requesting tenure credit, but -- but yes, 23 that's the starting salary. 24 Q. And by tenure credit, you mean credit 25 for experience as an attorney prior to joining the</p>
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<p>1 A. Well, I described the promotion process 2 and the -- the minimum requirements. Within the 3 confines of that, the district defender makes a 4 recommendation. That ultimate decision lies with 5 the district defender for promotion to APD II. 6 For APD III the ultimate decision lies 7 with the division director, or in the case of Greg 8 Mermelstein's division, with him as a deputy 9 director. With assistant public defender four after 10 the district defender recommends it and a district 11 defender approves, then -- then for the trial 12 division I have to approve it. For the appellate 13 PCR division, capital division, CDU, that would be 14 Mr. Mermelstein. 15 Q. How often is -- strike that. 16 You mentioned it is rare for an 17 assistant public defender one to not -- who meets 18 the tenure requirements to not be promoted to 19 assistant public defender two. How frequently does 20 an assistant public defender two not get promoted to 21 assistant public defender three? 22 A. Depends upon which time frame you're 23 meaning. Ultimately, I mean, I -- I suppose we have 24 people who obviously have left the system who -- and 25 before they're promoted to APD III, even though they</p>	<p>1 public defender's office? 2 A. Yes. 3 Q. How often is that tenure credit 4 granted? 5 A. I don't have a number. It's not very 6 often. 7 Q. Approximately how many years of 8 experience would an attorney have before the MSPD 9 would consider granting tenure credit? 10 A. There's no particular number. I mean, 11 we would certainly -- sort of compare it to our -- 12 to our in-house promotion criteria. 13 Q. So I'd like to turn now to a new topic, 14 the process by which MSPD attorneys are permitted or 15 required to refuse case appointments. Are you 16 familiar with the Missouri Supreme Court's decision 17 in I believe it's Missouri Public Defender 18 Commission v. Waters? 19 A. Yes. 20 Q. What is your understanding generally? 21 Not asking for recitation of the specific holding, 22 but generally what that case meant? 23 A. They upheld our caseload rule that we 24 had promulgated at the time under the -- our power 25 to adopt rules under the code of state regulations.</p>

20 (Pages 77 to 80)

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<p style="text-align: right;">Page 81</p> <p>1 They upheld that rule, which allowed us to certify 2 an office as overloaded and -- and not take on new 3 cases.</p> <p>4 Q. After that decision came down, how 5 often did MSPD offices certify that they were 6 overloaded and could not take on new cases?</p> <p>7 A. I don't have a certain number. There 8 were -- there were several, but it was short-lived.</p> <p>9 Q. Why was it short-lived?</p> <p>10 A. Because of the statutory change and the 11 legislative push leading up to that statutory 12 change.</p> <p>13 Q. What was the statutory change?</p> <p>14 A. In essence that -- that we could not 15 use that rule that we had promulgated under the code 16 of state regulations as a basis for turning away 17 cases.</p> <p>18 Q. You also mentioned the legislative push 19 leading up to that change. What did you mean by 20 legislative push?</p> <p>21 A. There was legislation that would -- 22 required us to contract out certain of our cases.</p> <p>23 Q. What do you mean by require to contract 24 out certain cases?</p> <p>25 A. Well, specifically as I -- the best I</p>	<p style="text-align: right;">Page 83</p> <p>1 but individually they would have been in the same 2 position. So the clients that we handled through 3 in-house representation still would have been 4 working with overloaded attorneys.</p> <p>5 As far as using contract attorneys for 6 the rest of the cases it was -- it was fraught with 7 problems. I think it would have been more 8 expensive. I think, you know, we wouldn't have been 9 able to provide training for those attorneys.</p> <p>10 I think because they likely would have 11 been trying to, you know, get the winning bid, they 12 would have been very low. You know, they would have 13 been low bids. They couldn't justify them spending 14 much time on the -- on the cases.</p> <p>15 Flat fees -- certainly flat fees such 16 as in this which would have been an agreement to 17 handle any -- an indefinite number of cases that 18 came, an unlimited number of cases that came in for 19 a certain price, but it's looked down upon by the 20 ABA as not -- not a good practice.</p> <p>21 In many areas of the state I don't 22 think there would have been either any attorneys or 23 attorneys qualified to be handling those cases. For 24 all sorts of reasons.</p> <p>25 Q. One of the reasons you mentioned is</p>
<p style="text-align: right;">Page 82</p> <p>1 could remember them, the legislation would have 2 required us to contract out all C and D felonies and 3 below, but given us no more money to do it. So we 4 would have to find the money to do it.</p> <p>5 Q. So the legislation would have sent C 6 and D felonies to panel attorneys or something 7 similar?</p> <p>8 A. It would have -- it would have required 9 as I remember for us to essentially go through a 10 process of letting -- letting contract attorneys 11 submit bids for -- for bulk contracts to handle 12 cases of certain parts of the state.</p> <p>13 Q. In your opinion, would that have been 14 an effective way to provide indigent defense in the 15 state of Missouri?</p> <p>16 A. It would not have been.</p> <p>17 Q. Why not?</p> <p>18 A. Well, first of all, it wouldn't have 19 solved our problem because no more money would have 20 been given us. So we would have had to lay off 21 staff in order to pay for it, and whatever staff was 22 left would have had to handle all the A, B felonies 23 and homicides. And it wouldn't have been enough.</p> <p>24 We still -- our staff would have been 25 in the same position. There would have been fewer,</p>	<p style="text-align: right;">Page 84</p> <p>1 that it would have been more expensive. Could you 2 elaborate on that concern a little bit?</p> <p>3 A. I believe that within the trial 4 division our average cost per case annually is I 5 think \$325. The cases that we contract out 6 currently to private attorneys, the average is 7 approximately \$700. So it costs us more than twice 8 the dollar amount to handle a case to contract a 9 case privately as opposed to handling it in-house.</p> <p>10 Q. Is it your understanding that following 11 Waters MSPD officials in some districts agreed not 12 to assign attorneys to cases where prosecutors 13 promise that defendants would face no jail time?</p> <p>14 A. I think when -- if the case became a 15 fine-only case, then we would not handle the case, 16 and so I don't think it was just a matter of the 17 prosecutor agreeing not to -- not to seek jail time. 18 The judge would have to agree up-front the case 19 would be a fine-only case, that nothing more than a 20 fine would be imposed on the case ever.</p> <p>21 Q. And was that for certain districts or 22 statewide?</p> <p>23 A. If you -- you know, it was by district.</p> <p>24 Q. Do you know which districts entered 25 into such agreements?</p>

21 (Pages 81 to 84)

<p style="text-align: right;">Page 85</p> <p>1 A. There were various for lack of a better 2 term Waters agreements entered into. I don't know 3 how many or any -- if any of them included declaring 4 certain classes of cases as fine-only. I don't 5 remember.</p> <p>6 Q. Regardless of the specifics of the 7 agreements, to use your term Waters agreements, do 8 you know which MSPD districts entered into Waters 9 type agreements?</p> <p>10 A. Not as I sit here today.</p> <p>11 Q. Do you know of any cases where the MSPD 12 agreed not to take a representation because of a 13 promise of no jail time only to learn later that 14 the -- that the defendant received jail time?</p> <p>15 A. I don't remember the specifics, but 16 that would not surprise me.</p> <p>17 Q. Why would it not surprise you?</p> <p>18 A. There was frequently confusion over 19 what fine-only meant. For instance, you know, 20 suspended imposition of sentence or a suspended 21 execution of sentence does not meet the terminology 22 of fine-only even though the person is given 23 probation at that time, unless the judge says if he 24 gets revoked I will never impose anything more than 25 a fine.</p>	<p style="text-align: right;">Page 87</p> <p>1 to Cat or other MSPD officials by legislators about 2 privatizing the system?</p> <p>3 A. Not specifics, no.</p> <p>4 Q. What about generally?</p> <p>5 A. Well, generally that, you know, they 6 were sponsoring bills and appeared they very well 7 might have the votes to do it. Then that was in the 8 House, and then the Senate substitute bill was 9 offered that -- that took out that language and 10 added ultimately what became language in the new 11 statute.</p> <p>12 But once the Senate did that then -- 13 then the House member amended other bills to include 14 his language that had been taken out of the Senate 15 bill. So it was -- it ended up being in various 16 pieces of legislation.</p> <p>17 Q. Do you remember which legislators those 18 were?</p> <p>19 A. It was Representative Stanley Cox who 20 -- who was sponsoring the language. 21 (WHEREIN, Exhibit 17, 1-16-13 Kelly 22 e-mail, was marked for identification.)</p> <p>23 Q. (By Mr. Shahabian) I'm handing you 24 what's been marked Plaintiffs' Exhibit 17. Do you 25 recognize this document?</p>
<p style="text-align: right;">Page 86</p> <p>1 If he's leaving jail on the table at 2 that time, even up-front the person is entitled to 3 counsel because he ultimately may get jail, and 4 there was often confusion over that.</p> <p>5 Q. What is the source of your knowledge 6 for that confusion?</p> <p>7 A. Just general recollection at the time.</p> <p>8 Q. Recollection based on your work in the 9 MSPD?</p> <p>10 A. Yes.</p> <p>11 Q. Are you aware that the -- so the then 12 head of the MSPD was Cat Kelly; is that correct?</p> <p>13 A. Correct.</p> <p>14 Q. Are you aware that Cat Kelly was told 15 that if local offices continued to turn away cases, 16 the legislature would privatize the entire indigent 17 defense system?</p> <p>18 A. I -- yes.</p> <p>19 Q. What is the source of your knowledge 20 for that?</p> <p>21 A. Working with Cat at the time at the -- 22 at the capitol and there were legislators sponsoring 23 the bill there.</p> <p>24 Q. What -- do you recall in any more 25 detail what specifically was said either to you or</p>	<p style="text-align: right;">Page 88</p> <p>1 A. Yes.</p> <p>2 Q. What does it appear to you to be?</p> <p>3 A. An a e-mail from director Cat Kelly to 4 the district defenders regarding timekeeping.</p> <p>5 Q. Approximately when was this e-mail 6 sent?</p> <p>7 A. January 16th, 2013.</p> <p>8 Q. Did you receive this e-mail?</p> <p>9 A. Yes, I would have received it.</p> <p>10 Q. If you could please turn to page two of 11 this document. Do you see the heading in the e-mail 12 that says caseload relief, about halfway down the 13 page?</p> <p>14 A. I do.</p> <p>15 Q. Could you read the first paragraph 16 following that heading out loud, for the record out 17 loud, please?</p> <p>18 A. (Quote as read): 19 I know there is a fair amount of angst, 20 anger, frustration, fill in the blank 21 here about the current state of our 22 efforts to obtain caseload relief. 23 When we won the Supreme Court ruling 24 last summer, we all thought we'd be 25 well on our way to reasonable caseload</p>

22 (Pages 85 to 88)

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<p>1 by this time. That of course hasn't</p> <p>2 turned out to be the case.</p> <p>3 Q. Do you know what Cat Kelly may have</p> <p>4 been referring to here in saying that hasn't turned</p> <p>5 out to be the case?</p> <p>6 MR. QUINLAN: Object to form, calling</p> <p>7 for speculation.</p> <p>8 A. I think she's referring both to the</p> <p>9 legislative efforts to -- to keep us from using our</p> <p>10 rulemaking authority and to require us to contract</p> <p>11 out certain of our cases, as well as the fact that</p> <p>12 the Waters meetings that were required under the</p> <p>13 Waters decision were not bearing any useful fruit.</p> <p>14 Q. (By Mr. Shahabian) Is that under -- is</p> <p>15 that consistent with your understanding of the state</p> <p>16 of affairs at the time?</p> <p>17 A. Yes.</p> <p>18 Q. Could you read the next sentence out</p> <p>19 loud, please?</p> <p>20 A. The next sentence or paragraph?</p> <p>21 Q. Just the next sentence.</p> <p>22 A. (Quote as read):</p> <p>23 There are quite a few who argue we</p> <p>24 should have forged ahead and not pulled</p> <p>25 back on certification when we did</p>	<p>1 Q. If I could focus your attention on the</p> <p>2 e-mail from Justin Carver starting at the bottom of</p> <p>3 page two and continuing to pages three and four.</p> <p>4 Does that e-mail look familiar to you?</p> <p>5 A. I don't remember it specifically.</p> <p>6 Q. Who is Justin Carver?</p> <p>7 A. He's our district defender in our</p> <p>8 Jefferson City office.</p> <p>9 Q. And if you look at the bottom of page</p> <p>10 two, who does it appear he is sending this e-mail</p> <p>11 to?</p> <p>12 A. I would say it looks like he's sending</p> <p>13 it to judges and courts where Jefferson City is</p> <p>14 responsible for the handling of public defender</p> <p>15 cases.</p> <p>16 Q. If you look at page three --</p> <p>17 A. Along with the -- some prosecuting</p> <p>18 attorneys, or attorney.</p> <p>19 Q. If you look at page three, the second</p> <p>20 full paragraph says (quote as read):</p> <p>21 The struggles of the public defender</p> <p>22 office remain. Every single one of my</p> <p>23 lawyers has expressed to me that their</p> <p>24 caseload is too high and that they</p> <p>25 cannot effectively handle the cases</p>
Page 90	Page 92
<p>1 regardless of the pushback from</p> <p>2 policymakers.</p> <p>3 Q. Do you have an understanding of what</p> <p>4 certification refers to?</p> <p>5 A. Yes.</p> <p>6 Q. What does it refer to?</p> <p>7 A. The process under our -- our caseload</p> <p>8 rule that had been upheld by the Waters decision</p> <p>9 that allowed us to certify an office and therefore</p> <p>10 not take on new cases.</p> <p>11 Q. Do you have an understanding of what</p> <p>12 pull back refers to?</p> <p>13 A. That we abandon the certification</p> <p>14 process.</p> <p>15 Q. Do you have an understanding of what</p> <p>16 pushback from policymakers refers to?</p> <p>17 A. I think he's referring to the</p> <p>18 legislative efforts.</p> <p>19 (WHEREIN, Exhibit 18, 12-29-16 Winfrey</p> <p>20 e-mail chain, was marked for identification.)</p> <p>21 Q. (By Mr. Shahabian) I'm handing you</p> <p>22 what's been marked Plaintiffs' Exhibit 18. Do you</p> <p>23 recognize this document?</p> <p>24 A. Without reading the entire document,</p> <p>25 no, I -- I don't remember seeing it, but I may have.</p>	<p>1 that they have.</p> <p>2 Is that statement consistent with your</p> <p>3 understanding of the caseload in the Jefferson City</p> <p>4 office?</p> <p>5 A. Yes.</p> <p>6 Q. Is that statement unique to the</p> <p>7 Jefferson City office?</p> <p>8 A. No.</p> <p>9 Q. Is that a statement that could be</p> <p>10 applied more generally to the MSPD system?</p> <p>11 A. Yes.</p> <p>12 Q. The next sentence says (quote as read):</p> <p>13 I have lawyers threatening to quit if I</p> <p>14 don't get their caseloads down to a</p> <p>15 level where they can be effective.</p> <p>16 Do you see that sentence?</p> <p>17 A. Yes.</p> <p>18 Q. To your understanding, is that</p> <p>19 statement consistent with the state of affairs of</p> <p>20 the Jefferson City public defender's office?</p> <p>21 A. Yes.</p> <p>22 Q. Is that unique to the Jefferson City</p> <p>23 public defender's office?</p> <p>24 A. No.</p> <p>25 Q. Are lawyers threatening to quit</p>

23 (Pages 89 to 92)

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<p>1 throughout the MSPD system due to high caseloads?</p> <p>2 A. Yes.</p> <p>3 Q. To your knowledge, have lawyers quit</p> <p>4 the MSPD due to high caseloads?</p> <p>5 A. Yes.</p> <p>6 Q. The next sentence says (quote as read):</p> <p>7 Director Barrett tells me that agency</p> <p>8 turnover is now at 22 percent.</p> <p>9 Does that appear to you to be an</p> <p>10 accurate statement of where total MSPD turnover</p> <p>11 stood at that time?</p> <p>12 A. Yes.</p> <p>13 Q. And to be clear, going back to page</p> <p>14 two, this e-mail was sent near the end of</p> <p>15 December 2016?</p> <p>16 A. Yes.</p> <p>17 Q. If you look down at the -- near the end</p> <p>18 of the page, the largest full paragraph says (quote</p> <p>19 as read):</p> <p>20 Starting in January when I receive a</p> <p>21 qualifying application for public</p> <p>22 defender services I will do one of two</p> <p>23 things. If the applicant is in jail, I</p> <p>24 will assign the applicant a lawyer</p> <p>25 immediately until all of my lawyers</p>	<p>1 Jefferson City office?</p> <p>2 A. They are not unique.</p> <p>3 Q. Could they be applied to the rest of</p> <p>4 the MSPD system?</p> <p>5 A. Yes.</p> <p>6 Q. If you could turn back to page two of</p> <p>7 this e-mail, e-mail chain, sorry, do you see an</p> <p>8 e-mail from PeggyRichardson@courts.mo.gov?</p> <p>9 A. I do.</p> <p>10 Q. Do you know who Peggy Richardson is?</p> <p>11 A. I believe she's a judge.</p> <p>12 Q. Looking at the e-mail she sent, it says</p> <p>13 starting with the sentence in any event, it says</p> <p>14 (quote as read):</p> <p>15 In any event, here is what I wish you</p> <p>16 could do. Instead of holding back on</p> <p>17 applications, go ahead and let us know</p> <p>18 if the defendant qualifies. After all,</p> <p>19 the fact of his or her qualification</p> <p>20 will not change. It is much easier to</p> <p>21 manage the cases with the lawyer in the</p> <p>22 case and then grant continuances due to</p> <p>23 the caseload. We know that on any</p> <p>24 given jury week there is no way the</p> <p>25 public defender can prepare for the</p>
Page 94	Page 96
<p>1 have become overloaded. If the</p> <p>2 applicant is not in jail, I will hold</p> <p>3 the application until the end of the</p> <p>4 month. If I have available lawyers at</p> <p>5 the end of the month, I will assign it</p> <p>6 to one of my lawyers. If I don't have</p> <p>7 available lawyers, I will be filing a</p> <p>8 motion to appoint a lawyer who is</p> <p>9 employed by the state of Missouri.</p> <p>10 Do you see that?</p> <p>11 A. Yes.</p> <p>12 Q. Did Justin Carver discuss his plan with</p> <p>13 the central MSPD office before sending this e-mail?</p> <p>14 A. Before sending the e-mail, I don't</p> <p>15 know.</p> <p>16 Q. Did the MSPD office become aware of</p> <p>17 this plan after this e-mail was sent?</p> <p>18 A. Either before or after, yes.</p> <p>19 Q. Do you have an understanding of why</p> <p>20 Justin Carver refused cases for applicants not in</p> <p>21 jail?</p> <p>22 A. Yes, for the reasons stated in his</p> <p>23 e-mail.</p> <p>24 Q. To your understanding, are the reasons</p> <p>25 in this e-mail for refusing cases unique to the</p>	<p>1 number of cases that get set, so at</p> <p>2 least for me continuances will be</p> <p>3 pretty freely given. It is a whole</p> <p>4 different ball game however when the</p> <p>5 case is just sitting there spinning on</p> <p>6 a return with counsel date. Perhaps</p> <p>7 what I'm asking doesn't fit what you're</p> <p>8 thinking, but please consider it.</p> <p>9 Do you see that suggestion by Peggy</p> <p>10 Richardson?</p> <p>11 A. I do.</p> <p>12 Q. Is it consistent with your</p> <p>13 understanding of an attorney's ethical</p> <p>14 responsibilities to accept appointment to a case</p> <p>15 that they cannot handle and seek continuances?</p> <p>16 A. No.</p> <p>17 Q. Would an MSPD attorney be risking their</p> <p>18 bar license to accept an appointment to a case they</p> <p>19 cannot handle and seek continuances?</p> <p>20 A. Yes.</p> <p>21 Q. What makes you think an MSPD attorney</p> <p>22 would be risking their bar license for doing that?</p> <p>23 A. Well, for one, the specific rules of</p> <p>24 professional conduct regarding competence,</p> <p>25 diligence, and communication. Two, ABA formal</p>

24 (Pages 93 to 96)

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<p>1 opinion, which has been cited favorably by the 2 Missouri Supreme Court.</p> <p>3 Three, the Pratt and Water decisions 4 where they've stated that bar licenses would be at 5 risk. Four, various bar complaints that are being 6 made against our attorneys both by judges, clients, 7 and perhaps prosecutors. And four, the recent 8 decision regarding one of our attorneys named Karl 9 Hinkebein.</p> <p>10 Q. What was that recent decision? 11 A. It was an order. It wasn't a written 12 opinion. It was an order suspending his license for 13 one year, but staying that suspension for a period 14 of probation of either one or two years.</p> <p>15 I might have the exact specifics wrong, 16 but suspend his license, stayed it, and put him on 17 probation. And I should add that not only the 18 complaints, but the recommendations being made by 19 the Office of Chief Disciplinary Counsel in light of 20 those complaints.</p> <p>21 Q. What recommendations are you referring 22 to? 23 A. Well, for example, in the Hinkebein 24 case, ultimately their recommendation was Missouri 25 Supreme Court was that his license be suspended.</p>	<p>1 the MSPD received a written response from the chief 2 disciplinary counsel to this request for guidance? 3 A. No, I don't know for sure.</p> <p>4 Q. How have MSPD offices reacted to the 5 Supreme Court's decision in Hinkebein? 6 A. Alarm, fear. Attorneys quitting. And 7 ultimately with district defenders reviewing 8 caseloads with their attorneys and finding out from 9 their attorneys whether or not they would think that 10 continuing -- continuing to accept new assignments 11 would violate their duties under the rules of 12 professional conduct, and that if that is the case, 13 to -- to alert the local judges to that fact and 14 that they would not be accepting new cases.</p> <p>15 Q. Are you aware of any counties that have 16 alerted judges to the fact that they will not be 17 accepting new cases? 18 A. Yes.</p> <p>19 Q. Which counties? 20 A. You know, I can tell you our district 21 offices. If I start naming counties I'll get them 22 wrong, but it's our --</p> <p>23 Q. District offices are fine too. 24 A. Our District 13, which is our Columbia 25 trial office. Our West Plains office, which I think</p>
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<p>1 (WHEREIN, Exhibit 19, 4-28-17 Barrett 2 letter to Pratzel, was marked for identification.)</p> <p>3 Q. (By Mr. Shahabian) I'm handing you 4 what's been marked Plaintiffs' Exhibit 19. Do you 5 recognize this document? 6 A. Yes.</p> <p>7 Q. What is it? 8 A. It's a letter dated April 28th, 2017 to 9 Alan Pratzel, chief disciplinary counsel, from our 10 director Michael Barrett regarding request for 11 guidance.</p> <p>12 Q. To your knowledge, was this sent -- 13 letter sent before or after the chief disciplinary 14 counsel recommended that Mr. Hinkebein's bar license 15 be suspended? 16 A. I believe it was before.</p> <p>17 Q. To your knowledge, did the chief 18 disciplinary counsel provide Mr. Barrett or the MSPD 19 with a response to this letter? 20 A. I believe after a long while there was 21 technically a response, but I believe the response 22 was I can provide you no guidance.</p> <p>23 Q. Was that response documented? 24 A. I don't know.</p> <p>25 Q. So to your knowledge, you don't know if</p>	<p>1 is District 37. Our Kennett office, which I think 2 is District 35. Our Rolla office, which I believe 3 is District 25. Our Nevada office, which I believe 4 is District 28. And I believe that's the list -- 5 those are the offices that I'm aware of.</p> <p>6 Q. And those are offices that have 7 communicated to judges that they will not be 8 accepting new cases? 9 A. Yes.</p> <p>10 Q. Do you know of any other offices that 11 are considering communicating to judges that they 12 will be no longer accepting new cases? 13 A. Yes.</p> <p>14 Q. What offices are those? 15 A. I don't specifically -- I can't recall 16 those, but I know I've seen e-mails from other 17 offices who are engaging in the process with their 18 attorneys to sit down with them and educate them on 19 the rules of professional conduct and hear from them 20 whether or not they can. 21 (Exhibit 2, Previously marked exhibit.)</p> <p>22 Q. (By Mr. Shahabian) I'm handing you 23 what's been marked Plaintiffs' Exhibit 2. Do you 24 recognize that document? 25 A. Yes.</p>

25 (Pages 97 to 100)

<p style="text-align: right;">Page 101</p> <p>1 Q. What is it?</p> <p>2 A. It is a letter dated September 11th,</p> <p>3 2017 from our director Michael Barrett that was sent</p> <p>4 to all of our attorneys regarding the Hinkebein</p> <p>5 order.</p> <p>6 Q. What is your general understanding of</p> <p>7 the intent of this letter?</p> <p>8 A. To let them know of the Hinkebein</p> <p>9 decision, and that the Supreme Court expected them</p> <p>10 and rules of professional conduct require them to</p> <p>11 follow the rules of professional conduct.</p> <p>12 Q. If you look about halfway down that</p> <p>13 letter, do you see a reference to, quote, materials</p> <p>14 for withdrawing due to excessive caseload?</p> <p>15 MS. SHIPMA: End of the third</p> <p>16 paragraph.</p> <p>17 A. Yes, uh-huh.</p> <p>18 Q. (By Mr. Shahabian) Do you know what</p> <p>19 that is referring to?</p> <p>20 A. To material that's posted on our</p> <p>21 litigation resource board.</p> <p>22 Q. What sorts of materials?</p> <p>23 A. Sample motions or materials for drawing</p> <p>24 due to excessive caseload, and the ABA opinion I</p> <p>25 think is probably posted there. Mister --</p>	<p style="text-align: right;">Page 103</p> <p>1 Q. Does the MSPD have any role in</p> <p>2 overseeing private counsel appointed to handle cases</p> <p>3 by Judge Crane in Boone County?</p> <p>4 A. No.</p> <p>5 (WHEREIN, Exhibit 20, Missouri Bar</p> <p>6 President announcement, was marked for</p> <p>7 identification.)</p> <p>8 Q. (By Mr. Shahabian) I'm handing you</p> <p>9 Plaintiffs' Exhibit 20. Do you recognize this</p> <p>10 document?</p> <p>11 A. Yes.</p> <p>12 Q. What is it?</p> <p>13 A. It is an announcement sent out I</p> <p>14 believe to all the Boone County attorneys alerting</p> <p>15 them to what was happening in Boone County and as</p> <p>16 set forth in Judge Crane's e-mail essentially, and</p> <p>17 also outlines other efforts the Missouri Bar has</p> <p>18 undertaken and will undertake.</p> <p>19 Q. If you look at the fourth full</p> <p>20 paragraph starting with the second sentence, it says</p> <p>21 (quote as read):</p> <p>22 That's why I met with the Missouri</p> <p>23 State Public Defender system director</p> <p>24 to discuss these challenges two weeks</p> <p>25 ago immediately following the board</p>
<p style="text-align: right;">Page 102</p> <p>1 Mr. Mermelstein, who moderates litigation resource</p> <p>2 board, would be -- you know, best be able to tell</p> <p>3 you exactly what's on there.</p> <p>4 Q. If you haven't yet produced those</p> <p>5 documents, could you produce those?</p> <p>6 MS. SHIPMA: Uh-huh. We've been</p> <p>7 preparing a supplemental response to you for a</p> <p>8 couple of weeks now.</p> <p>9 MR. SHAHABIAN: Thanks for letting me</p> <p>10 know.</p> <p>11 (Exhibit 3, Previously marked exhibit.)</p> <p>12 Q. (By Mr. Shahabian) I'm handing you</p> <p>13 what's been marked Plaintiffs' Exhibit 3. Do you</p> <p>14 recognize this document?</p> <p>15 A. Yes.</p> <p>16 Q. What is it?</p> <p>17 A. It is a e-mail sent by presiding Judge</p> <p>18 Crane in Boone County to the Boone County Bar</p> <p>19 Association alerting them to the fact that our</p> <p>20 public defender office, our Columbia trial office</p> <p>21 specifically had stated that they could no longer</p> <p>22 accept new cases under the rules of professional</p> <p>23 conduct, and as a result Boone County judges would</p> <p>24 be appointing private counsel to handle indigent</p> <p>25 representation in those cases.</p>	<p style="text-align: right;">Page 104</p> <p>1 meeting where I was elected president</p> <p>2 of the State Bar. Then I met with the</p> <p>3 deputy director.</p> <p>4 Is that referring to a meeting with</p> <p>5 you?</p> <p>6 A. It is.</p> <p>7 Q. What did you discuss at that meeting?</p> <p>8 A. Our hope that the Missouri Bar could --</p> <p>9 could work with us in solving our caseload problem.</p> <p>10 Q. What if anything did Morry Cole,</p> <p>11 Missouri Bar President, say to you in response to</p> <p>12 that?</p> <p>13 A. That they would -- they would take back</p> <p>14 our ideas. They had -- the meeting he was referring</p> <p>15 to, they had -- they announced they were forming a</p> <p>16 public defender committee within the bar to help</p> <p>17 look at the problem and come up with the ideas, and</p> <p>18 any ideas that Michael Barrett or I had given them,</p> <p>19 that, you know, they would -- they would take those</p> <p>20 under consideration and look at them along with any</p> <p>21 other ideas that they came up with.</p> <p>22 Q. If you look at the first paragraph of</p> <p>23 this letter, the last full sentence says (quote as</p> <p>24 read):</p> <p>25 To assist lawyers appointed in these</p>

<p style="text-align: right;">Page 105</p> <p>1 cases, the Missouri Bar is providing</p> <p>2 educational resources and sample forms</p> <p>3 in the members-only section of</p> <p>4 mobardot.org. under criminal defense</p> <p>5 appointment resources.</p> <p>6 Did the MSPD have any role in the -- in</p> <p>7 the preparation or providing of those materials to</p> <p>8 attorneys appointed in Boone County?</p> <p>9 A. You know, some of them -- I haven't</p> <p>10 looked to see what's there recently. Some of them</p> <p>11 may be left over from when we were certifying</p> <p>12 offices under the Waters decision. Some of them may</p> <p>13 be new.</p> <p>14 You might ask Mr. Mermelstein. It</p> <p>15 seems like I heard either him or our training</p> <p>16 director state that they had been contacted about</p> <p>17 supplying some materials, but I'm not sure. You'd</p> <p>18 want to check with Mr. Mermelstein.</p> <p>19 Q. Did the MSPD oversee how the Missouri</p> <p>20 Bar provides resources to lawyers appointed to</p> <p>21 represent clients in Boone County?</p> <p>22 A. No.</p> <p>23 Q. We've talked about district offices and</p> <p>24 lawyers in the MSPD refusing new cases. To your</p> <p>25 knowledge, since the Hinkebein decision, have any</p>	<p style="text-align: right;">Page 107</p> <p>1 Q. You mentioned earlier that the</p> <p>2 timekeeping requirement was suspended by</p> <p>3 Mr. Barrett. Do you know if that requirement is</p> <p>4 suspended indefinitely?</p> <p>5 A. Yeah, it's suspended indefinitely, but</p> <p>6 -- but I say that, it's suspended. It could start</p> <p>7 up again, but suspended indefinitely.</p> <p>8 Q. But there are no plans to reimpose</p> <p>9 timekeeping requirements?</p> <p>10 A. No.</p> <p>11 Q. I know we're jumping around a bit, but</p> <p>12 going back to the Waters agreements we talked about</p> <p>13 earlier, in a case where the prosecutor's office had</p> <p>14 agreed not to seek jail time, would it be your</p> <p>15 understanding within the experience of those</p> <p>16 agreements for courts to still require defendants to</p> <p>17 post bail?</p> <p>18 A. I'm not sure I understand the question.</p> <p>19 Q. Let me rephrase. You testified that</p> <p>20 Waters agreements covered generally cases where the</p> <p>21 prosecutor and the judge agreed not to impose jail</p> <p>22 as a sentence?</p> <p>23 A. Correct.</p> <p>24 Q. Or fine-only to use your words.</p> <p>25 Setting aside sentencing, would it have been</p>
<p style="text-align: right;">Page 106</p> <p>1 MSPD attorneys filed motions to withdraw from</p> <p>2 existing cases due to excessive caseloads?</p> <p>3 A. I don't think so.</p> <p>4 Q. So I want to go back for a second to</p> <p>5 something we talked about at the beginning of this</p> <p>6 deposition. You mentioned that on July 1st of this</p> <p>7 year the MSPD began using panel attorneys almost</p> <p>8 exclusively for conflict cases. Is that an accurate</p> <p>9 statement of what your prior testimony?</p> <p>10 A. For new conflict cases that came to us</p> <p>11 after July 1st.</p> <p>12 Q. What precipitated that change?</p> <p>13 A. Increase in our appropriation from the</p> <p>14 legislature that -- that allowed us to do that.</p> <p>15 Q. Do you expect that change to be</p> <p>16 permanent?</p> <p>17 A. We hope. I mean, there's an</p> <p>18 appropriation process every year.</p> <p>19 Q. If the resources are not there, would</p> <p>20 the MSPD go back to using MSPD attorneys from other</p> <p>21 districts as conflict counsel in conflict cases?</p> <p>22 A. To the extent that we could provide</p> <p>23 them and -- and those offices were accepting new</p> <p>24 cases as far as I know. And we haven't really</p> <p>25 talked about that.</p>	<p style="text-align: right;">Page 108</p> <p>1 within -- would the MSPD still have agreed not to</p> <p>2 take a representation in a case like that where even</p> <p>3 though there was no threat of jail at the sentencing</p> <p>4 phase, the judge imposed a bail requirement that</p> <p>5 required the defendant to remain in pretrial custody</p> <p>6 until bail had been posted?</p> <p>7 A. That may very well have been the case,</p> <p>8 but I don't have any specific recollection.</p> <p>9 Q. Are there any policies or procedures</p> <p>10 from the state office, from the central MSPD office</p> <p>11 on how MSPD attorneys should use depositions in</p> <p>12 representing clients?</p> <p>13 A. No.</p> <p>14 Q. If an MSPD attorney wanted to take a</p> <p>15 deposition, how would they do that?</p> <p>16 A. Through the encumbrance request process</p> <p>17 that -- that I've described.</p> <p>18 Q. And that encumbrance request process</p> <p>19 would be used to pay for a court reporter --</p> <p>20 A. Yes.</p> <p>21 Q. -- or videographer? Are there any</p> <p>22 monetary limits that govern the use of depositions?</p> <p>23 A. We -- we have a list of court reporters</p> <p>24 who have agreed to the state contract, and by state</p> <p>25 contract I don't -- I'm not referring to a public</p>

27 (Pages 105 to 108)

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<p style="text-align: right;">Page 109</p> <p>1 defender contract, but a state contract rates. And</p> <p>2 unless there's a reason to deviate from that, to use</p> <p>3 those court reporters as the most cost effective.</p> <p>4 Q. Are there any other limits placed on</p> <p>5 MSPD attorneys who are requesting depositions?</p> <p>6 A. No.</p> <p>7 Q. Are there differences in how districts</p> <p>8 supervise the use of depositions?</p> <p>9 A. I believe so.</p> <p>10 Q. What kinds of differences?</p> <p>11 A. Well, I mean, I can't say specifically,</p> <p>12 but certainly there are offices that submit more --</p> <p>13 more deposition encumbrance requests than other</p> <p>14 offices, and that could be because of district</p> <p>15 defender policies or -- or practices. It could be</p> <p>16 by the culture of the -- the offices.</p> <p>17 Q. Does the central office of the MSPD</p> <p>18 track the number of requests for depositions?</p> <p>19 A. We have an encumbrance number database</p> <p>20 that would have that information.</p> <p>21 Q. Is that database broken down by</p> <p>22 district?</p> <p>23 A. Yes.</p> <p>24 MR. SHAHABIAN: If you haven't provided</p> <p>25 that information previously, could you provide that</p>	<p style="text-align: right;">Page 111</p> <p>1 for attorneys who have to travel great distances for</p> <p>2 a case?</p> <p>3 A. It could happen.</p> <p>4 Q. But you don't have an understanding of</p> <p>5 a general practice one way or another?</p> <p>6 A. No.</p> <p>7 Q. Are there policies and procedures</p> <p>8 relating to how often MSPD trial attorneys meet with</p> <p>9 their clients?</p> <p>10 A. We have guidelines for representation</p> <p>11 addressing client contact.</p> <p>12 Q. What do those guidelines state</p> <p>13 generally?</p> <p>14 A. The initial contact is to occur within</p> <p>15 seven days of commencement of representation. The</p> <p>16 ongoing contact is to occur monthly.</p> <p>17 Q. And that's a statewide policy?</p> <p>18 A. It's a guideline.</p> <p>19 Q. That's a statewide guideline?</p> <p>20 A. Yes.</p> <p>21 Q. Does the MSPD track how often trial</p> <p>22 attorneys meet those guidelines?</p> <p>23 A. It's reviewed through the appraisal</p> <p>24 process.</p> <p>25 Q. How is that information collected for</p>
<p style="text-align: right;">Page 110</p> <p>1 in your forthcoming supplemental production?</p> <p>2 MS. SHIPMA: I think I did provide it.</p> <p>3 MR. SHAHABIAN: Okay. And I may have</p> <p>4 missed it.</p> <p>5 MS. SHIPMA: There were only 23,000</p> <p>6 pages of documents. How you missed it ...</p> <p>7 Q. (By Mr. Shahabian) Are there policies</p> <p>8 and procedures governing travel cost reimbursements</p> <p>9 by MSPD attorneys or investigators?</p> <p>10 A. Well, they have to fill out a monthly</p> <p>11 expense report to -- to get reimbursed. There are</p> <p>12 statewide travel regulations that apply to the</p> <p>13 state, not just to the public defender system.</p> <p>14 We -- you know, where it's practical</p> <p>15 and cheaper we -- we ask attorneys to use rental car</p> <p>16 rather than drive their own vehicles. Beyond that,</p> <p>17 if there's any other policies it would be at the</p> <p>18 local level.</p> <p>19 Q. Does the MSPD reduce caseloads for</p> <p>20 attorneys that have to travel great distances?</p> <p>21 A. That would be a district defender</p> <p>22 decision about how to allocate caseload within their</p> <p>23 own offices.</p> <p>24 Q. Isn't it your understanding the</p> <p>25 district defenders generally would adjust caseloads</p>	<p style="text-align: right;">Page 112</p> <p>1 the appraisal process?</p> <p>2 A. File reviews. And by file reviews I</p> <p>3 mean review of both physical files and electronic</p> <p>4 files in our case management database.</p> <p>5 Q. So MSPD attorneys should mark when they</p> <p>6 visit clients in the files?</p> <p>7 A. Yes. It should be documented.</p> <p>8 Q. Does the MSPD have any immigration</p> <p>9 expert attorneys on staff?</p> <p>10 A. Currently no. I don't believe we do.</p> <p>11 Q. Does the MSPD have agreements with</p> <p>12 outside attorneys who specialize in immigration</p> <p>13 matters for consulting purposes?</p> <p>14 A. I wouldn't say agreements. I mean,</p> <p>15 there are particularly in the urban area, at least</p> <p>16 Kansas City, a particular immigration law firm that</p> <p>17 requests would most often go to, I believe.</p> <p>18 Q. Do you know how often requests are sent</p> <p>19 to that law firm?</p> <p>20 A. Only if there's an encumbrance request.</p> <p>21 Q. Do any districts in the state of</p> <p>22 Missouri have sizable immigrant communities?</p> <p>23 A. Yes.</p> <p>24 Q. Which districts?</p> <p>25 A. I don't know specifically. Certainly</p>

28 (Pages 109 to 112)

<p style="text-align: right;">Page 113</p> <p>1 the urban areas, but it's not confined to that. I</p> <p>2 mean, I think numerous rural areas do.</p> <p>3 Q. Do you know roughly how many public</p> <p>4 defenders are employed in the trial division right</p> <p>5 now?</p> <p>6 A. In the trial division, no. I mean,</p> <p>7 within the -- with the system attorneys, including</p> <p>8 assistant public defenders and district defenders</p> <p>9 and deputy district defenders I think it's around</p> <p>10 378, somewhere around there, attorneys in the public</p> <p>11 defender system.</p> <p>12 Q. 378 refers to not just trial division</p> <p>13 attorneys, but also appellate and PCR attorneys?</p> <p>14 A. Right.</p> <p>15 Q. Do you know roughly the average number</p> <p>16 of years that a trial division attorney has been</p> <p>17 employed by the MSPD?</p> <p>18 A. No.</p> <p>19 Q. When an MSPD attorney decides to leave</p> <p>20 the MSPD or is terminated, is it the practice of the</p> <p>21 MSPD to have an exit interview?</p> <p>22 A. We provide them with an exit interview</p> <p>23 and offer them to schedule a discussion with the HR</p> <p>24 manager to go over the -- the exit interview.</p> <p>25 Q. Roughly how -- how often do MSPD</p>	<p style="text-align: right;">Page 115</p> <p>1 the district attorney's office?</p> <p>2 A. Well, again, I think it's frequently</p> <p>3 because their caseloads there would be lower,</p> <p>4 salaries would be higher. Might be for other</p> <p>5 reasons.</p> <p>6 MR. SHAHABIAN: Can we go off the</p> <p>7 record?</p> <p>8 VIDEOGRAPHER: We're going off the</p> <p>9 record at approximately 3:45 p.m.</p> <p>10 (WHEREIN, a recess was taken.)</p> <p>11 VIDEOGRAPHER: We're back on the record</p> <p>12 at approximately 3:52 p.m.</p> <p>13 MR. SHAHABIAN: Thanks very much for</p> <p>14 your time, Mr. Elmer. I have no further questions</p> <p>15 at this time.</p> <p>16 EXAMINATION</p> <p>17 QUESTIONS BY MR. RAMSEY:</p> <p>18 Q. Mr. Elmer, my name is Steven Ramsey. I</p> <p>19 represent the State of Missouri and Governor Eric</p> <p>20 Greitens, and I have a handful of questions.</p> <p>21 A. All right.</p> <p>22 Q. I apologize for being mildly sporadic,</p> <p>23 but we're going to jump around just a bit. Okay.</p> <p>24 If I understood your testimony correctly, you've</p> <p>25 been in the system for over 30 years, the MSPD</p>
<p style="text-align: right;">Page 114</p> <p>1 attorneys who are leaving the MSPD's employment go</p> <p>2 through an exit interview?</p> <p>3 A. I don't know.</p> <p>4 Q. During those exit interviews do the</p> <p>5 public defenders explain why they are leaving if</p> <p>6 they are leaving voluntarily?</p> <p>7 A. They're asked and they frequently</p> <p>8 provide that answer.</p> <p>9 Q. What sorts of answers do MSPD attorneys</p> <p>10 give for leaving?</p> <p>11 A. Well, by far the majority are caseload</p> <p>12 and salaries.</p> <p>13 Q. And by caseload and salaries, you mean</p> <p>14 caseloads are too high?</p> <p>15 A. And salaries are too low, yes.</p> <p>16 Q. Do you know how many public defenders</p> <p>17 leave the MSPD to join district attorney's offices?</p> <p>18 A. Not specifically, no.</p> <p>19 Q. Does it happen?</p> <p>20 A. Yes.</p> <p>21 Q. Would you say it's rare, infrequent,</p> <p>22 occasional?</p> <p>23 A. Occasional would probably be the best</p> <p>24 word?</p> <p>25 Q. Why would an MSPD attorney leave for</p>	<p style="text-align: right;">Page 116</p> <p>1 system for over 30 years?</p> <p>2 A. Correct.</p> <p>3 Q. Now, in that time when it comes to</p> <p>4 written policies and procedures, it sounds as if</p> <p>5 it's very much a discretionary system in terms of</p> <p>6 the various districts have discretion to -- to</p> <p>7 promote guidelines. Is that accurate?</p> <p>8 A. I would describe it as very</p> <p>9 decentralized with a lot of autonomy to our district</p> <p>10 offices.</p> <p>11 Q. So my question concerns the types of</p> <p>12 procedures and policies that are centralized. At</p> <p>13 this point in time are you aware of any policies and</p> <p>14 procedures that deal with attorney supervision?</p> <p>15 A. You know, the -- not specifically.</p> <p>16 Appraisal process and promotion process and</p> <p>17 promotion criteria, but --</p> <p>18 Q. But none as to the actual supervision</p> <p>19 of how attorneys tasked with supervisor should go</p> <p>20 about that process?</p> <p>21 A. Correct.</p> <p>22 Q. Are there any policies and procedures</p> <p>23 concerning ensuring the effective assistance of</p> <p>24 counsel of assistant public defenders?</p> <p>25 A. Our guidelines are representation.</p>

29 (Pages 113 to 116)

<p style="text-align: right;">Page 117</p> <p>1 Q. I don't quite follow.</p> <p>2 A. Well, the point of them is to -- is to</p> <p>3 make sure that by following those guidelines that</p> <p>4 our clients will be effectively represented.</p> <p>5 Q. Let me ask this question a different</p> <p>6 way. In terms of the various training opportunities</p> <p>7 that you have throughout the course of the year,</p> <p>8 whether it's the spring training or the new employee</p> <p>9 orientation, are any of those geared at just</p> <p>10 ensuring the effective assistance of counsel,</p> <p>11 like --</p> <p>12 A. In the sense that they're providing the</p> <p>13 attorneys with some of the training they need in</p> <p>14 order to do that.</p> <p>15 Q. And are there any trainings -- are</p> <p>16 there any trainings tasked with teaching supervision</p> <p>17 or -- or helping those who are managing other</p> <p>18 attorneys to -- to supervise attorneys underneath</p> <p>19 them?</p> <p>20 A. We have defender management workshop</p> <p>21 that's normally held once a year.</p> <p>22 Q. About how long is that training?</p> <p>23 A. Approximately three days.</p> <p>24 Q. Okay. And is it mandatory or</p> <p>25 discretionary?</p>	<p style="text-align: right;">Page 119</p> <p>1 few?</p> <p>2 A. Yeah, over a 30 period -- 30-year</p> <p>3 period, yes.</p> <p>4 Q. Would you be able to ballpark figure</p> <p>5 that in terms of --</p> <p>6 A. No.</p> <p>7 Q. Is it 50 or what do you mean by quite a</p> <p>8 few?</p> <p>9 A. Not infrequent.</p> <p>10 Q. Not infrequent. So you would not be</p> <p>11 able to -- in any way to put a number on that in</p> <p>12 terms of just like a hundred, 200, you just -- it's</p> <p>13 not infrequent, but you can't put a figure on it?</p> <p>14 A. Correct.</p> <p>15 Q. Would there be any records kept in your</p> <p>16 Missouri State Public Defender system in terms of</p> <p>17 there's one judicial determination, there's two, is</p> <p>18 there any recordkeeping of that?</p> <p>19 A. No.</p> <p>20 Q. Okay. So this is all from your vantage</p> <p>21 point of view 30-year career?</p> <p>22 A. Yeah, from being specifically aware of</p> <p>23 some at the time of having to conflict off cases</p> <p>24 because of allegations or finding of</p> <p>25 ineffectiveness, which may have occurred at a</p>
<p style="text-align: right;">Page 118</p> <p>1 A. It's mandatory.</p> <p>2 Q. Who all is -- who all is required to go</p> <p>3 to that?</p> <p>4 A. District defenders and deputy district</p> <p>5 defenders.</p> <p>6 Q. At this point in time are you familiar</p> <p>7 with any instances within your tenure at the</p> <p>8 Missouri State Public Defender's system where</p> <p>9 there's been a judicial determination of ineffective</p> <p>10 assistance of counsel?</p> <p>11 A. Sure.</p> <p>12 Q. How many would you say, like one?</p> <p>13 Would you say ten?</p> <p>14 A. Over what period of time? 30 years?</p> <p>15 Q. Yeah, let's go with that, over</p> <p>16 30 years.</p> <p>17 A. A lot.</p> <p>18 Q. And would that normally come in a PCR</p> <p>19 motion, a post-conviction?</p> <p>20 A. Usually a post-conviction motion. They</p> <p>21 frequently never find their way to the appellate</p> <p>22 courts. It will be a trial court ruling. That's</p> <p>23 why if you just look at appellate court decisions it</p> <p>24 may not seem as many as there actually are.</p> <p>25 Q. But your sense is that there's quite a</p>	<p style="text-align: right;">Page 120</p> <p>1 post-conviction level or sometimes occurs at motions</p> <p>2 to withdraw before a sentencing.</p> <p>3 A judge allows an attorney or client to</p> <p>4 withdraw his plea based upon claims of ineffective</p> <p>5 assistance of counsel, and then those that come to</p> <p>6 me to be conflicted off.</p> <p>7 Q. Are you aware -- same vein, just a</p> <p>8 different part of the office question. Are you</p> <p>9 aware of any ethical complaints against Missouri</p> <p>10 state public defenders?</p> <p>11 A. Yes.</p> <p>12 Q. Would you say -- so there's the one</p> <p>13 obvious example that was -- that's been referenced</p> <p>14 today. Are you familiar with more than that?</p> <p>15 A. Yes.</p> <p>16 Q. And are you familiar with any of those</p> <p>17 complaints that have risen to the level that we've</p> <p>18 seen in the Supreme Court case recently?</p> <p>19 A. Do I remember a public defender</p> <p>20 being -- his license having been suspended, not</p> <p>21 right offhand, no.</p> <p>22 Q. Slightly different topic. Turning more</p> <p>23 towards the caseloads. Are you familiar with the</p> <p>24 state statute that allows for public defenders to</p> <p>25 motion to the court to have a conference concerning</p>

30 (Pages 117 to 120)

<p style="text-align: right;">Page 121</p> <p>1 caseload concerns?</p> <p>2 A. Yes.</p> <p>3 Q. In your recollection and in your</p> <p>4 experience, has that statute ever been used to -- to</p> <p>5 consider workload concerns?</p> <p>6 A. What do you mean by consider? Has it</p> <p>7 ever been used?</p> <p>8 Q. Yeah. Have you all ever filed a motion</p> <p>9 to your knowledge to have a conference with the</p> <p>10 judge to have a conversation about having too much</p> <p>11 workloads for a public defender or set of public</p> <p>12 defenders?</p> <p>13 A. Not that I'm aware of.</p> <p>14 Q. Concerning the communication from the</p> <p>15 various districts to the various judges saying we're</p> <p>16 not going to be taking any more cases, are all of</p> <p>17 those to your knowledge e-mails or just informal</p> <p>18 conversations with -- with the judge to your</p> <p>19 knowledge?</p> <p>20 A. I think they've all been letters to the</p> <p>21 judges, probably mixed with conversations along with</p> <p>22 the letters.</p> <p>23 Q. But no motions?</p> <p>24 A. No.</p> <p>25 Q. Okay.</p>	<p style="text-align: right;">Page 123</p> <p>1 A. Yeah.</p> <p>2 Q. Did it keep track per case?</p> <p>3 A. Yeah. There were -- there were some</p> <p>4 tasks that were case related, case specific. Some</p> <p>5 tasks were not case specific. So some of the time</p> <p>6 showed up under our case, yes.</p> <p>7 Q. And then per task?</p> <p>8 A. Yes.</p> <p>9 Q. Was it on a daily basis similar to the</p> <p>10 time entry system you alluded to earlier in terms of</p> <p>11 each two-week period?</p> <p>12 A. Yes.</p> <p>13 Q. Was it separate from that system?</p> <p>14 A. Yes.</p> <p>15 Q. Do you know the precise time that the</p> <p>16 logging system was discontinued?</p> <p>17 A. Not offhand.</p> <p>18 Q. Do you know who would know that?</p> <p>19 A. Offhand, I -- you know, I could easily</p> <p>20 figure it out.</p> <p>21 Q. It's just not in front of you right</p> <p>22 now?</p> <p>23 A. I think it was about a year and a half</p> <p>24 ago, but I don't have the date in my mind.</p> <p>25 Q. Is there currently a repository of raw</p>
<p style="text-align: right;">Page 122</p> <p>1 A. They're not in the case, there's no</p> <p>2 motion to be filed -- to be filed.</p> <p>3 Q. Turning to the time logging system, at</p> <p>4 any point before -- I think it was said about three</p> <p>5 and a half year time period where you all kept time</p> <p>6 logs, did that ever occur before that time period?</p> <p>7 A. Yes.</p> <p>8 Q. Do you know about when did that occur?</p> <p>9 A. A few years before that there was a</p> <p>10 short sort of -- I would refer to it as -- I know it</p> <p>11 was designed to be short. It was done for one of</p> <p>12 the studies that was being -- was happening at the</p> <p>13 time, I think.</p> <p>14 Q. So it happened for a short stint before</p> <p>15 that three and a half year period?</p> <p>16 A. Yes.</p> <p>17 Q. Then it happened for that three and a</p> <p>18 half year period?</p> <p>19 A. Yes.</p> <p>20 Q. And then it's been discontinued</p> <p>21 indefinitely at this point in time?</p> <p>22 A. Correct.</p> <p>23 Q. During any of those periods did the</p> <p>24 system keep track of the time spent per the system</p> <p>25 public defender?</p>	<p style="text-align: right;">Page 124</p> <p>1 data from that system?</p> <p>2 A. Yeah. There's a database.</p> <p>3 Q. And is that historical data available</p> <p>4 in terms of the per day, per task, per case written</p> <p>5 down?</p> <p>6 A. It's there.</p> <p>7 Q. And currently even though that system</p> <p>8 has been discontinued, are you all still tracking</p> <p>9 that data in any way, the per case, per defender,</p> <p>10 per task?</p> <p>11 A. No.</p> <p>12 Q. So not at all?</p> <p>13 (Court reporter interruption.)</p> <p>14 A. No.</p> <p>15 Q. (By Mr. Ramsey) Are you familiar with</p> <p>16 any constitutional requirement for the public</p> <p>17 defender system to represent those in immigration</p> <p>18 cases? Pardon me.</p> <p>19 A. As an immigration court? Or in --</p> <p>20 Q. Either/or.</p> <p>21 A. I'm not sure what you mean by</p> <p>22 immigration cases.</p> <p>23 Q. Well, I -- the question was very</p> <p>24 general, but sure, immigration court or a case that</p> <p>25 touches immigration.</p>

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<p style="text-align: right;">Page 125</p> <p>1 MR. SHAHABIAN: Objection to vague as 2 to any case that touches immigration. 3 Q. (By Mr. Ramsey) Any case that occurs 4 in an immigration court? 5 A. No, we don't provide representation in 6 immigration court. 7 Q. Now, I apologize for my sporadic 8 questions, but I'm going to jump back into the 9 conflict realm. Just so I understand, so the 10 conflict system is much broader than simply the Code 11 49 system. Is that accurate? Or Code 49 is a 12 subsection of the conflict? 13 A. It's a subsection. 14 Q. So at this point in time are all 15 conflicts being handled or being contracted out to 16 contract attorneys or these panel attorneys? 17 A. New cases coming in, virtually all of 18 them absent a rare exception. 19 Q. And at this point in time in terms of 20 contract attorneys, is the only purpose or the only 21 use of contract attorneys conflict cases or is there 22 any other way that the MSPD system utilizes contract 23 attorneys? 24 A. We -- if there's sufficient money in 25 our budget, we will do some what we call overload</p>	<p style="text-align: right;">Page 127</p> <p>1 which I can only guess have to do with different 2 time periods. 3 MR. RAMSEY: Just wanted to clarify if 4 we were talking about the same thing on that matter. 5 No further questions. 6 MS. SHIPMA: I have a couple of 7 questions. 8 EXAMINATION 9 QUESTIONS BY MS. SHIPMA: 10 Q. Joel, are the RubinBrown numbers used 11 in any way with respect to the cases that you send 12 through the contract system? 13 A. Yes. 14 Q. Can you explain how that is? 15 A. I'm aware of any -- at any given time 16 that for the current fiscal year what -- you know, 17 what is the RubinBrown weight of the cases we have 18 assigned to a panel attorney for that fiscal year. 19 Q. Okay. Are you familiar with an 20 attorney by the name of Richard Scherrer? 21 A. Yes. 22 Q. And what is his relationship with MSPD? 23 A. He spearheads our Missouri Coalition 24 For Right to Counsel. I think actually he's a 25 volunteer member of our St. Louis city staff.</p>
<p style="text-align: right;">Page 126</p> <p>1 contracting of nonconflict cases. 2 Q. Do you have a sense for how often that 3 occurs when you have that excess budgetary 4 allocation to do that? 5 A. It varies from year to year. We've 6 done it a little bit this year already, this fiscal 7 year. It's a small percent of our budget. 8 Q. Would you take a stab at maybe two or 9 three percent or how would you -- 10 A. I'd have to look. 11 Q. Okay. Now, just a clarification on 12 Exhibits 10 and 11, and those were the exhibits -- I 13 believe they're still in front of you with the 14 various list of attorneys by bar number, caseload, 15 and workload. And I believe one was alluded to as 16 being from the trial -- 17 A. Yes. 18 Q. -- department, the other was from the 19 PCR. Was it your understanding that that -- those 20 figures came from the aggregate sum of all cases 21 handled by those attorneys in-between the years 2009 22 and 2017? 23 A. I don't know the time period. I don't 24 know over what period of time. I mean, there's 25 various documents it looks like all stapled together</p>	<p style="text-align: right;">Page 128</p> <p>1 Q. And what is his function there on the 2 St. Louis city staff? 3 A. I think the liaison with the Missouri 4 Coalition of Right to Counsel attorneys and firms. 5 Q. Does he supervise any of the attorneys 6 who are providing that representation? 7 A. Oh, I don't think so. 8 Q. Okay. 9 MR. QUINLAN: How do you spell his last 10 name. 11 MS. SHIPMA: S-C-H-E-R-E-R [sic], I 12 believe. Not the same Richard Sher who was our 13 mediator. 14 MR. QUINLAN: Right. 15 Q. (By Ms. Shipma) I want to ask a 16 question about management training. When new 17 district defenders are brought on, is there any type 18 of training for them other than the three-day yearly 19 management training? 20 A. Some one-on-one coaching and mentoring 21 by their division directors. 22 Q. Is there a systemwide training? 23 A. There is also, I forgot, a periodic new 24 district defender training that I think usually is 25 one day of the newest district defenders. I say</p>

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<p>1 periodic. It's essentially a handful of new 2 district defenders will schedule them. 3 MS. SHIPMA: Okay. That's all the 4 questions I have. 5 MR. SHAHABIAN: Just have a few more 6 follow-up questions based on those questions. I'll 7 be really short. 8 FURTHER EXAMINATION 9 QUESTIONS BY MR. SHAHABIAN: 10 Q. Mr. Elmer, you mentioned that in your 11 30 years at the MSPD you had seen cases involving a 12 judicial finding of ineffective assistance of 13 counsel. To the best of your recollection, did any 14 -- did excessive caseloads factor into the finding 15 of ineffective assistance in any of those cases? 16 A. I don't know. 17 Q. You mentioned something about overload 18 contracting for panel attorneys. Why would the MSPD 19 use overload contracting to assign cases to panel 20 attorneys? 21 A. To help alleviate our caseload problem. 22 Q. You mentioned that it fluctuates from 23 year to year. Why would the caseload -- how would 24 that -- could you help me understand why it 25 fluctuates year to year if the goal is to relieve</p>	<p>1 MR. SHAHABIAN: I have no further 2 questions at this time. 3 VIDEOGRAPHER: We're going off the 4 record at approximately 4:10 p.m. 5 (WHEREIN, the deposition was concluded 6 at 4:10 p.m.) 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
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<p>1 caseloads? 2 A. Because there's only a certain amount 3 of money available. I go into each fiscal year 4 knowing my -- my working budget for case 5 contracting. We may be coming in under budget 6 because there are fewer conflicts than we 7 anticipated so that will free up money. 8 On the other hand there may be other 9 areas within the public defender system such as 10 litigation expenses that are going over budget, so I 11 need to come in under budget to -- to help fund 12 litigation expenses. 13 And -- and so, you know, once that 14 first scenario would allow us to do more overload 15 contracting, the second scenario would allow us to 16 do less overload contracting or no overload 17 contracting. 18 Q. And you mentioned the Missouri 19 Coalition Right to Counsel pro bono attorneys. In 20 your opinion, how impactful is that program to the 21 ability of the MSPD to meet its mission to provide 22 indigent defense? 23 A. Well, as far as alleviating our 24 caseload issue, it's not effective at all. I mean, 25 60 cases out of 85,000 doesn't make much of a dent.</p>	<p>1 CERTIFICATE OF REPORTER 2 3 I, William L. DeVries, a Certified 4 Court Reporter (MO), Certified Shorthand Reporter 5 (IL), Registered Diplomate Reporter, and a Certified 6 Realtime Reporter, do hereby certify that the 7 witness whose testimony appears in the foregoing 8 deposition was duly sworn by me pursuant to Section 9 492.010 RSMo; that the testimony of said witness was 10 taken by me to the best of my ability and thereafter 11 reduced to typewriting under my direction; that I am 12 neither counsel for, related to, nor employed by any 13 of the parties to the action in which this 14 deposition was taken, and further that I am not a 15 relative or employee of any attorney or counsel 16 employed by the parties thereto, nor financially or 17 otherwise interested in the outcome of the action. 18 19 20 21 _____ 22 Certified Court Reporter 23 within and for the State of Missouri 24 25</p>

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<div style="text-align: center;">MIDWEST LITIGATION SERVICES</div> <p>October 9, 2017</p> <p>Ms. Jacqueline Shipma Missouri State Public Defender Woodrail Center 1000 West Nifong Building 7, Suite 100 Columbia, Missouri 65203</p> <p>IN RE: SHONDEL CHURCH, et al. vs. STATE OF MISSOURI, et al.</p> <p>Dear Ms. Shipma,</p> <p>Please find enclosed your copies of the deposition of JOEL R. ELMER taken on October 4, 2017 in the above-referenced case. Also enclosed is the original signature page and errata sheets.</p> <p>Please have the witness read your copy of the transcript, indicate any changes and/or corrections desired on the errata sheets, and sign the signature page before a notary public.</p> <p>Please return the errata sheets and notarized signature page within 30 days to our office at 711 N 11th Street, St. Louis, MO 63101 for filing.</p> <p>Sincerely,</p> <p>William L. DeVries, RDR/CRR</p> <p>35446</p>	<p>STATE OF _____)</p> <p>COUNTY OF _____)</p> <p>I, JOEL R. ELMER, do hereby certify:</p> <p>That I have read the foregoing deposition;</p> <p>That I have made such changes in form and/or substance to the within deposition as might be necessary to render the same true and correct;</p> <p>That having made such changes thereon, I hereby subscribe my name to the deposition.</p> <p>I declare under penalty of perjury that the foregoing is true and correct.</p> <p>Executed this _____ day of _____, 20____, at _____.</p> <p style="text-align: right;">_____ JOEL R. ELMER</p> <p style="text-align: right;">_____ NOTARY PUBLIC</p> <p>My Commission Expires:</p>
<div style="text-align: center;">Page 134</div> <div style="text-align: center;">ERRATA SHEET</div> <p>Witness Name: JOEL R. ELMER</p> <p>Case Name: SHONDEL CHURCH, et al. vs. STATE OF MISSOURI, et al.</p> <p>Date Taken: OCTOBER 4, 2017</p> <p>Page # _____ Line # _____</p> <p>Should read: _____</p> <p>Reason for change: _____</p> <p>Page # _____ Line # _____</p> <p>Should read: _____</p> <p>Reason for change: _____</p> <p>Page # _____ Line # _____</p> <p>Should read: _____</p> <p>Reason for change: _____</p> <p>Page # _____ Line # _____</p> <p>Should read: _____</p> <p>Reason for change: _____</p> <p>Page # _____ Line # _____</p> <p>Should read: _____</p> <p>Reason for change: _____</p> <p>Witness Signature: _____</p>	

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